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IN THE

SUPREME COURT OF THE UNITED STATES

No. 84

O. B. WILLIAMS and LILLIE SHAVER HENDRIX,
Petitioners

vs.

THE STATE OF NORTH CAROLINA,
Respondent

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT

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BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT

STATEMENT OF CASE

The petitioners were tried in the Superior Court of Caldwell County, North Carolina, and convicted of bigamous cohabitation, a criminal offense under Section 14-183 of the General Statutes of North Carolina. The conviction was affirmed by the Supreme Court of North Carolina in an opinion filed April 12, 1944, which is reported as STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 224 N. C. 183. A petition for writ of *certiorari* from the United States Supreme Court to the Supreme Court of North Carolina was granted June 12, 1944.

FACTS

The petitioners, O. B. Williams and Lillie Shaver Hendrix, were tried at the February Term, 1941, of the Caldwell County Superior Court and convicted of bigamous cohabitation. They appealed to the Supreme Court of North Carolina where their convictions were sustained. The opinion of the Supreme Court of North Carolina is reported as STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 220 N. C. 445. They then petitioned the United States Supreme Court for a writ of *certiorari*. The writ was granted in 1942, 315 U. S. 795, 86 L. ed. 1196. The United States Supreme Court reversed the convictions of the defendants and remanded the case for further proceedings, 315 U. S. 287, 87 L. ed. 279. The Supreme Court of North Carolina remanded the case to the Superior Court of Caldwell County for a new trial in 1943. STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 222 N. C. 609. The jury again convicted the petitioners, which conviction was affirmed by the Supreme Court of North Carolina in STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 224 N. C. 183.

The statute under which the petitioners were indicted (Section 14-183 of the General Statutes of North Carolina) reads, in part, as follows:

"If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony . . . Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . ."

The evidence for the State showed that the petitioner Williams was married in North Carolina in 1916 to Carrie Wike Williams; that he lived here with his wife until May 7, 1940; that they raised a family of four children; that Tom Hendrix, the husband of petitioner Hendrix, worked for petitioner Williams; that on May 15, 1940, petitioner Williams had left the State of North Carolina and was staying at the Alamo Court, Las Vegas, Nevada; that on June 26, 1940 (exactly six weeks after arrival in Nevada), by publication of summons, he instituted an action for a divorce in Nevada, in which action there was no appearance by his wife, the defendant; that a decree of divorce was granted by a Nevada court on August 26, 1940; that petitioner Williams married petitioner Hendrix in Nevada on October 4, 1940; that in the Fall of 1940 the petitioners returned to North Carolina and lived in Pinola as husband and wife; that petitioner Williams' first wife was still living at the time and had not procured a divorce, but has since died.

The evidence for the State showed further that the petitioner Hendrix was married in North Carolina about 1920 to Tom Hendrix, that she lived in North Carolina with her husband until about May, 1940; that she left the State suddenly and on May 15, 1940, was staying at the same Alamo Court, Las Vegas, Nevada; Tom Hendrix testified that when he went home from his work at petitioner Williams' store at 7:30 o'clock at night "she was gone. They were gone about three months or longer." On June 26, 1940 (exactly six weeks after arrival), she instituted, by publication of summons, a suit for divorce in the State of Nevada, in which there was no appearance by Tom Hendrix, her husband; that a decree of divorce was granted by a Nevada court on October 4, 1940; that on that same day (October 4, 1940) petitioner Hendrix

was married to the petitioner Williams in Las Vegas, Nevada; that the petitioners immediately returned to Pineola, North Carolina, where they lived as husband and wife; that petitioner Hendrix' first husband, Tom Hendrix, was living at the time of this indictment and had not procured a divorce.

The evidence also showed that the petitioners were gone form North Carolina only about three months, and that immediately upon their return they bought a home; that they employed the same attorney—I. S. Thompson, who was a lawyer practicing in Las Vegas, Nevada, and who also acted as Notary Public for both parties, and that the petitioner Williams appeared as a witness for the petitioner Hendrix.

The jury in the trial court, under the instructions of the court in the judge's charge, returned a verdict of guilty as to both defendants.

In the trial of this case in the Superior Court of Caldwell County, the evidence of the case and the contentions of the defendants and the State of North Carolina were fully reviewed in the charge made by the presiding judge. In his charge, Judge Ervin, with care and remarkable precision, fully and definitely instructed the jury as to the law arising on the facts of the case. A study of this charge will completely disclose the legal theory upon which the case was tried, upon which the jury based its verdict.

ARRANGEMENT OF BRIEF

The numerous exceptions relied upon by the defendants on this appeal all fall within four categories and for convenience will be discussed under the following headings:

I. Petitioners' Pleas of Former Jeopardy Were Properly Rejected;

II. The Nevada Divorce Decrees are not Entitled to Full Faith and Credit since the Plaintiffs Therein Acquired no *Bona Fide* Domicile in Nevada, Notwithstanding the Decrees Recite that such *Bona Fide* Domicile was Acquired;

III. The North Carolina Statute under which the Petitioners were Convicted is Constitutional;

IV. The Questions of Policy Posed by Petitioners are Matters which Ought to be Decided by the States.

I

PETITIONERS' PLEAS OF FORMER JEOPARDY WERE PROPERLY REJECTED.

A

The second trial of this case in the Superior Court of Caldwell County involved only one controverted question. Had the defendants, O. B. Williams and Lillie Shaver Hendrix, acquired *bona fide* domiciles or residences *animus manendi* at the time they were granted divorces in Nevada.

The jury returned a verdict of guilty as to both defendants. Under the charge of the court this verdict by the jury was a finding of fact that neither of the defendants, at the time the divorces were granted, was domiciled in Nevada.

The motion to dismiss filed by the defendants and their pleas of former jeopardy are predicated upon the idea that this Court had already decided, on the former hearing, this question favorably to them and is now precluded from further consideration of it.

That such was not the purpose of the Court and that the case was remanded for a new trial is shown by the following excerpts from the opinion of Mr. Justice Douglas:

"The intimation of the majority opinion (220 NC pp. 460-464, 17 SE (2d) 769) that the Nevada divorces were collusive suggests that the second theory on which the state tried the case may have been an alternative ground for the decision below, adequate to sustain the judgment under the rule of Bell v. Bell, 181 US 175, 45 L ed 804, 21 S Ct 551—a case in which this Court held that a decree of divorce was not entitled to full faith and credit when it had been granted on constructive service by the courts of a state in which neither spouse was domiciled. But there are two reasons why we do not reach that issue in this case. In the first place, North Carolina does not seek to sustain the judgment below on that ground. Moreover it admits that there probably is enough evidence in the record to require that petitioners be considered 'to have been actually domiciled in Nevada.' In the second place, the verdict against petitioners was a general one. Hence even though the doctrine of Bell v. Bell, 181 US 175, 45 L ed 804, 21 S Ct 551 *supra*, were to be deemed applicable here, we cannot determine on this record that petitioners were not convicted on the other theory on which the case was tried and submitted, viz. the invalidity of the Nevada decrees because of Nevada's lack of jurisdiction over the defendants in the divorce suits. That is to say, the verdict of the jury for all we know may have been rendered on that ground alone, since it did not specify the basis on which it rested. It therefore follows here as in Stromberg v. California, 283 US 359, 368, 75 L ed 1117, 1123, 51 S Ct 532, 73 ALR 1484, that if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. No reason has been suggested why the rule of the Stromberg Case is inapplicable here. Nor has any reason been advanced why the rule of the Stromberg Case is not both appropriate and nec-

essary for the protection of rights of the accused. To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury, would be to countenance a procedure which would cause a serious impairment of constitutional rights. Accordingly, we cannot avoid meeting the Haddock v. Haddock issue in this case by saying that the petitioners acquired no *bona fide* domicile in Nevada. If the case had been tried and submitted on that issue only, we would have quite a different problem, as Bell v. Bell indicates. We have no occasion to meet that issue now and we intimate no opinion on it. However it might be resolved in another proceeding, we cannot evade the constitutional issue in this case on the easy assumption that petitioners' domicile in Nevada was a sham and a fraud. . . .

"But the question for us is a limited one. In the first place, we repeat that in this case we must assume that petitioners had a *bona fide* domicile in Nevada, not that the Nevada domicile was a sham. We thus have no question on the present record whether a divorce decree granted by the courts of one state to a resident as distinguished from a domiciliary is entitled to full faith and credit in another state. Nor do we reach here the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicile was acquired in Nevada. . . .

"Haddock v. Haddock is overruled. The judgment is reversed and the cause is remanded to the Supreme Court of North Carolina for proceedings not inconsistent with this opinion."

In accord with the mandate of this Court, the Supreme Court of North Carolina directed that the case be sent back to the Superior Court of Caldwell County for trial in accordance with the opinion of this Court, STATE v. O. B. WILLIAMS and LILLIE SHAVER HENDRIX, 222 N. C. 609, in a *per curiam* opinion as follows:

"The judgment heretofore entered in this cause upholding the conviction and judgments entered at the February-March Term, Caldwell Superior Court, reported in 220 N. C. 445, 17 S. E. (2d), 769, will be vacated or set aside, and the cause remanded for a new trial in accordance with the opinion of the Supreme Court of the United States, rendered 21 December, 1942, on *certiorari* to this Court. See O. B. WILLIAMS and LILLIE SHAVER HENDRIX, PETITIONERS, v. STATE OF NORTH CAROLINA, 317 U. S., ..., 87 L. Ed., 189, decided 21 December, 1942. Accordingly, the defendants will recover their costs incurred in the Supreme Court of the United States, and the costs heretofore assessed in this Court will be retaxed."

Following the conviction of the defendants in the second trial in the Superior Court of Caldwell County, these defendants appealed to the Supreme Court of North Carolina and in this Court, in answer to the plea of former jeopardy, Stacy, C. J., comments as follows:

"Even if the jury had found the defendants were domiciled in Nevada, still under the doctrine of Haddock, the divorce decrees, since they were entered on constructive service, might have been, and in fact for this very reason were, held for naught in North Carolina. This, and this alone, is what the court of last resort overruled and 'reversed.' The record did not disclose a finding by the jury that the defendants had actually acquired *bona fide* domiciles in Nevada. Indeed, they

may have found just the reverse. The verdict was a general one and there was evidence to support the State's challenge to the defense on the single ground of defective process or on the dual ground of no *bona fide* domicile and no valid process, albeit the record indicated the latter as the basic cause for sustaining the challenge. The indefiniteness of the record in this respect, however, coupled with an admission which the State regarded as immaterial under the HADDOCK case, *supra*, induced the reversal of the judgment of affirmance. In other words, the legal theory upon which the State chiefly relied to defeat the defense set up by the defendants was disapproved. This did not perforce preclude further challenge to the defense on other grounds. It eliminated the second premise, but it did not work an acquittal of the defendants. An error in respect of the defense set up in a criminal action would not dispose of the indictment. Moreover, the confession was made in the appellate court. Had such admission been made by the solicitor in the trial court and acted upon by the jury, a different situation might have arisen. But that is another matter. 20 Am. Jur., 469. See S. v. BUTLER, 151 N. C., 672, 65 S. E., 993, 25 L. R. A. (N. S.), 169, 19 Ann. Cas., 402. To sustain the conviction and the judgment upholding it, the State was compelled to rely on the principle of the Haddock decision because it was the main theory of the trial. The issue was squarely joined."

It appears to be settled that where a defendant is convicted of a criminal offense and appeals and a new trial is granted, the plea of former conviction or former acquittal is not available to him.

UNITED STATES v. BALL, 163 U. S. 662, 41 L. ed. 300;
MURPHY v. MASSACHUSETTS, 177 U. S. 155, 44 L. ed. 711;

STROUD v. UNITED STATES, 251 U. S. 15, 64 L. ed. 103. Rehearing denied 251 U. S. 380, 64 L. ed. 317;
HILL v. TEXAS, 316 U. S. 400, 86 L. ed. 1559.

In HILL v. TEXAS, *supra*, the Court says:

"A prisoner whose conviction is reversed by this Court need not go free if he is in fact guilty, for Texas may indict and try him again by the procedure which conforms to constitutional requirements."

In UNITED STATES v. BALL, *supra*, it is said:

"Their plea of former conviction cannot be sustained, because upon a writ of error sued out by themselves the judgment and sentence against them were reversed, and the indictment ordered to be dismissed. How far, if they had taken no steps to set aside the proceedings in the former case, the verdict and sentence therein could have been held to bar a new indictment against them need not be considered, because it is quite clear that a defendant, who procures a judgment against him upon an indictment to be set aside, may be tried anew upon the same indictment, or upon another indictment, for the same offense of which he had been convicted."

On page 19 of petitioners' brief, under the subhead ARGUMENT, petitioners state that on the former hearing in this Court the State admitted that the evidence appearing in the record was sufficient to establish at least colorable *bona fide* residences in the State of Nevada. In our brief in the former hearing, it was said on page 6:

"Although the claim of the petitioners to have been domiciled in Nevada at the time they obtained their divorce decrees appears to be somewhat colorable, there is probably enough evidence in the Record to require that they be considered, *for purposes of this appeal*, to have been actually domiciled in Nevada." (Italics added).

This statement was made because it was considered by the State that HADDOCK v. HADDOCK, 201 U. S. 562, 50 L. ed. 867, was controlling and standing at the threshold of the case was conclusive against the petitioners without consideration of the other question of *bona fides* of the domiciles and, therefore, the question of domicile would not be reached. HADDOCK v. HADDOCK was not at that time questioned by the petitioners and had not been challenged at any stage of the litigation. Overruling HADDOCK v. HADDOCK was probably as unexpected by the petitioners as it was by the State. Furthermore, it was said in the former brief, on page 16:

"Surely no one will contend that respect for the sanctity of the marital relationships is engendered by the unseemly spectacle of married persons, upon sudden or trivial provocation, departing from the state of their domicile, establishing a *fictitious* residence for the sole purpose of getting a divorce, and securing a decree in a state which operates 'divorce mills' as a commercial racket and which is usually so far away as to make it inconvenient for the other spouse to make an appearance."

The statement, therefore, made on page 6 of our former brief has little to do with this hearing.

B

The Constitution of the United States does not protect an individual against "double jeopardy" or successive prosecutions for the same offense in a state court. The Fifth Amendment, which provides that no person shall for the same offense be twice put in jeopardy of life or limb, is a limitation upon action by the Federal Government and does not apply to action by states.

BARRON v. BALTIMORE, 7 Pet. 243;
UNITED STATES v. LANZA, 260 U. S. 377.

The petitioner's brief thus presents no question for decision under the Fifth Amendment.

The Fourteenth Amendment ("due process" and "privileges and immunities") does not guarantee to an individual the right not to be twice placed in jeopardy for the same offense.

AMRINE v. TINES (1942; C.C.A. 10), 131 F. (2d) 827.
Compare: PALKO v. CONNECTICUT, 302 U. S. 319;
MAXWELL v. DOW, 176 U. S. 581.

In Amrine v. Tines, *supra*, it is said at page 833:

"And, unlike the fundamental right to assistance of counsel granted by the Six Amendment to the Constitution, the right not to be twice placed in jeopardy for the same offense granted by the Fifth Amendment, is not generally regarded as a member of that family of fundamental rights coming within the scope and protection of the due process and privileges and immunities clause of the Fourteenth Amendment and from which is derived Federal power to correct state process."

Since the guarantee of due process afforded by the Fourteenth Amendment does not protect an individual against successive prosecutions for the same crime in a state court, the petitioners' pleas of former jeopardy could only have raised questions concerning rights guaranteed them by the State Constitution. In affirming the conviction and sentence of imprisonment, the Supreme Court of North Carolina necessarily determined that the petitioners were not twice placed in jeopardy for the same offense in contravention of the

North Carolina Constitution. Compare WHITE v. TEXAS, 310 U. S. 530. The decision on this point was, therefore, a decision of a state court with respect to a question arising under the constitution of the state. Such a question, the United States Supreme Court cannot review.

CRANE v. CAMPBELL, 245 U. S. 304;
DAVIS v. OHIO, 241 U. S. 565;
GRAHAM v. WEST VIRGINIA, 224 U. S. 616.

II

THE NEVADA DIVORCE DECREES ARE NOT ENTITLED TO FULL FAITH AND CREDIT SINCE THE PLAINTIFFS THEREIN ACQUIRED NO *BONA FIDE* DOMICILE IN NEVADA, EVEN THOUGH THE DECREES RECITE THAT SUCH *BONA FIDE* DOMICILE WAS ACQUIRED.

In order to confer jurisdiction in divorce actions under the law of Nevada, it is necessary for the plaintiff to satisfy the jury that his physical presence in Nevada preceding and including the date of commencement of his action was accompanied by the intent to remain in Nevada permanently, or at least for an indefinite time.

LAMB v. LAMB (Nev., 1937), 63 P. (2d) 872, 875.

Thus, if a plaintiff in a divorce action instituted in Nevada did not have the requisite intent while in Nevada, it would necessarily follow that any divorce procured by him would be a nullity in that State. Being a nullity where rendered, the decree would be a nullity everywhere, at least, in so far as the full faith and credit clause of the Constitution of the United States (Art. IV, Sec. 1) is concerned.

The Nevada divorce decrees interposed by the petitioners as a defense to this criminal prosecution recite that the plain-

tiffs therein are *bona fide* and continuous residents of Nevada and have been such for more than six weeks immediately preceding the commencement of the divorce actions. Are these declarations conclusive? The adjudicated cases compel a negative answer.

In 1874 it was held in THOMPSON v. WHITMAN, 85 U. S. 457, 21 L. ed. 897, that neither the full faith and credit clause of the Constitution of the United States (Art. IV, Sec. 1) nor the Act of Congress passed in pursuance thereof (1 Stat. at L., 122) prevented an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered; that the record of a judgment rendered in another state might be contradicted as to the facts necessary to give the court jurisdiction, and, that if it should appear such facts did not exist, the record would be a nullity, notwithstanding a recital in the judgment that such facts did exist.

Twenty-seven years later (1901) Mr. Justice Gray, speaking for the Court in BELL v. BELL, 181 U. S. 175, 45 L. ed. 804, and citing THOMPSON v. WHITMAN, *supra*, said:

"The question in this case is of the validity of the divorce obtained by the husband in Pennsylvania. No valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a state in which neither party is domiciled. And by the law of Pennsylvania every petitioner for divorce must have had a *bona fide* residence within the state for one year next before the filing of the petition. Penn. Stats. March 13, 1815, chap. 109, S 2; HOLLISTER v. HOLLISTER, 6 Pa. 449. The recital in the proceedings in Pennsylvania of the facts necessary to show jurisdiction may be contradicted."

The decision in BELL v. BELL, *supra*, was held to be controlling in the case of STREITWOLF v. STREITWOLF, 181 U. S. 179, 45 L. ed. 807, decided at the same term.

The decisions of the Court in THOMPSON v. WHITMAN, *supra*, BELL v. BELL, *supra*, and STREITWOLF v. STREITWOLF, *supra*, were, in turn, followed and buttressed by the opinion of Mr. Justice White in ANDREWS v. ANDREWS, 188 U. S. 14, 45 L. ed. 366, in the following language:

"It was contended that to permit the jurisdictional facts, which were foreclosed by the judgment, to be re-examined, would be a violation of the due faith and credit clause of the Constitution. This court, however, decided to the contrary, saying:

"'We think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the 4th article of the Constitution, and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.'

"The ground upon which this conclusion was predicated is thus embodied in an excerpt made from the opinion delivered by Mr. Chief Justice Marshall, speaking for the court, in ROSE v. HIMELY, 4 Cranch, 269, 2 L. ed. 617, where it was said:

"'Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If, by any means whatever, a prize court should be induced to con-

demn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

In GERMAN SAVINGS & LOAN SOCIETY v. DORMITZER, 192 U. S. 125, 48 L. ed. 373, Mr. Justice Holmes observed:

"It is too late now to deny the right collaterally to impeach a decree of divorce made in another state, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction and the appearance of the other party. ANDREWS v. ANDREWS, 188 U. S. 14, 39, 47 L. ed. 366, 372, 23 Sup. Ct. Rep. 237, 176 Mass. 92, 93, 57 N. E. 333. An attempt was made to avoid the authority of ANDREWS v. ANDREWS by the suggestion that there the respondent in the divorce suit had disappeared before the decree. But a respondent cannot defeat jurisdiction by disappearing. Indeed, in strictness, only the attorney disappeared, and the respondent simply ceased to defend the suit. The effect given to the statute of Massachusetts in that case depended wholly on contradicting the record of the divorce suit and proving the want of jurisdiction by proving the libellant's want of domicile in the state."

The sound policy upon which the above decisions are based is very aptly phrased by Mr. Justice Bradley in THOMPSON v. WHITMAN, *supra*, as follows:

"But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the

court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry."

For seventy years the decision quoted from above has stood unchanged, and it would seem that its antiquity and general acceptance would place it in the position of having "settled the law."

Before the decision in WILLIAMS and HENDRIX v. NORTH CAROLINA, *supra*, the doctrine that jurisdiction over the subject matter in divorce cases rests upon domicile, or at least, residence *animus manendi*, of at least one of the parties in the divorce forum and that the full faith and credit clause did not prevent an inquiry in a state other than the divorce forum into the *bona fide* of this domicile or residence *animus manendi*, notwithstanding a recital in the decree or record of the jurisdictional fact of domicile or residence, had been adopted by many states. This doctrine, it appears, had been adopted in the following states by express holding, by dictum or by implication:

Alabama: See JENKINS v. JENKINS, 194 So. 493;
California: WYNNE v. WYNNE, 66 P. (2d) 467;
District of Columbia: SEARS v. SEARS, 92 F (2d) 550;
Georgia: ADAMS v. ADAMS, 13 S. E. (2d) 173;
Illinois: GREIN v. GREIN, 25 N. E. (2d) 409;
Louisiana: STATE v. WENZEL, 171 So. 38;
Maine: USEN v. USEN, 13 A. (2d) 738;

Minnesota: NORRIS v. NORRIS, 273 N. W. 708. (By implication);

Mississippi: See HOPKINS v. HOPKINS, 165 So. 414;

Nebraska: See LIPPINCOTT v. LIPPINCOTT, 3 N. W. (2d) 207;

New Jersey: SPRAGUE v. SPRAGUE, 23 A. (2d) 810;

New Mexico: See GOLDEN v. GOLDEN, 68 P. (2d) 928;

Rhode Island: HOROWITZ v. HOROWITZ, 192 A. 796 (By implication);

Virginia: See DRY v. RICE, 137 S. E. 473.

It is the contention of the State of North Carolina that the United States Supreme Court decisions heretofore cited are in no way affected by the decision of the Court in WILLIAMS and HENDRIX v. NORTH CAROLINA, *supra*. This view has been adopted by *every* state which has had occasion to pass upon the question since the decision in the WILLIAMS case, *supra*.

Alabama: WILKES v. WILKES, 16 So. (2d) 16;

Connecticut: HOOKER v. HOOKER, 32 A. (2d) 68;

Delaware: IN RE AINSCOW'S ESTATE 34 A. (2d) 593;

Iowa: HOBSON v. DEMPSEY CONST. CO., 7 N. W. (2d) 896;

Illinois: BROWN v. HALL, 52 N. E. (2d) 781.
See ATKINS v. ATKINS, 54 N. E. (2d) 488;

Massachusetts: BOWDITCH v. BOWDITCH, 50 N. E. (2d) 65;

New Jersey: WOLFF v. WOLFF, 34 A. (2d), 156.
See MASCOLA v. MASCOLA, 33 A. (2d) 864.

New York: See IN RE HOLMES' ESTATE, 52 N. E. (2d) 424.

See IN RE BINGHAMS' WILL, 39 N. Y. S. (2d) 756.

See McCARTHY v. McCARTHY, 39 N. Y. S. (2d) 922;

Ohio: See SMITH v. SMITH, 50 N. E. (2d) 889;

Pennsylvania: COMMONWEALTH EX REL ESENWEIN v. ESENWEIN, 35 A. (2) 335 (Heard at this term of this Court).

In WILKES v. WILKES, *supra*, the Court says:

"We are not persuaded that the Williams case overturns the rule in Alabama or can be made to support a decree of divorce procured by fictitious averment and proof of jurisdictional facts, often declared a fraud on the court pronouncing the decree. The dignity and sanctity of judicial proceedings may, perhaps, be the better preserved by keeping open the way to prevent the use of the courts as the unwitting instruments of fraud. And is not the proper forum to test such question that forum in which the parties can be personally served and the issues litigated inter partes?"

In HOOKER v. HOOKER, *supra*, Maltbie, C. J., says:

"The plaintiffs claim that the decree of the Nevada court is not open to attack here upon the ground that the court lacked jurisdiction, relying mainly upon the recent decision of the Supreme Court of the United States in Williams v. North Carolina, *supra*. They misconceive the scope of that decision."

In BOWDITCH v. BOWDITCH, *supra*, Dolan, J., observes:

"As we interpret the decision under discussion, we are of opinion that it is still competent for the courts of other states to inquire into the validity of a divorce so far, at least, as its

validity depends upon the jurisdiction of the State where the divorce was granted and that a domicile by one of the parties in the state in which the divorce was granted is essential to jurisdiction. See Williams v. North Carolina, 317 U. S. 287, 297, 298, 63 S. Ct. 207, 87 L.Ed. ..... *That there is nothing in the Williams case contrary to the rule that one who relies upon a foreign divorce must not only plead and prove it, but must also prove his bona fide domicile at the time the divorce relied upon was granted in the foreign State, is the interpretation placed upon the Williams case in cases since decided by a State court* (though not of last resort). See Schnabel v. Schnabel, 179 Misc. 620, 39 N.Y.S. 2d 972; Jiránek v. Jiranek, 179 Misc. 502, 39 N.Y.S. 2d 523; Meyers v. Meyers, 179 Misc. 680, 40 N.Y.S. 2d 444. We are of opinion that there is nothing in the Williams case in conflict with Bell v. Bell, 181 U. S. 175, 21 S.Ct. 551, 45 L. Ed. 804, which holds that at least the petitioner must be genuinely domiciled in the State that granted the divorce." (Italics added).

The position contended for here is not to be confused with the doctrine enunciated in cases in which an appearance is made and the question of the jurisdiction of the court granting the divorce is actively contested. Annotation, 52 A. L. R. 740, DAVIS v. DAVIS, 305 U. S. 32, 83 L. ed. 26. Here there was no appearance by the defendant in the divorce action, either in person, by attorney, or by answer, and the question of the *bona fides* of the petitioners' domicile or residence has not been actively contested. DAVIS v. DAVIS, *supra*, and the cases cited in the annotation to 52 A.L.R. 740, are not, therefore, in point.

The petitioners seek to distinguish BELL v. BELL, *supra*, on the ground that there the evidence showed that Bell was not domiciled in the state granting the divorce decree while

here, they contend, the evidence is not sufficient to show that petitioners were not domiciled in Nevada. This Court has no jurisdiction to review the State Court's finding on this point.

When a state court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of *certiorari*.

NOBLE v. MITCHELL, 164 U. S. 367, 41 L. ed. 472;

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U. S. 269, 71 L. ed. 639;

BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITIES COMMISSION, 309 U. S. 30, 84 L. ed. 563.

In NOBLE v. MITCHELL, *supra*, Mr. Justice White says:

"It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to a jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which is not subject to review here on writ of error."

However, it should be remembered that the divorce decrees here were offered as an affirmative defense to a criminal prosecution. Where a defendant relies upon some independent, distinct, substantive matter of exemption, immunity or defense, beyond the essentials of the legal definition of the offense itself, the *onus* of proof as to such matters is upon the defendant.

STATE v. CARPENTER, 215 N. C. 635;

See MUGLER v. KANSAS, 123 U. S. 623, 31 L. ed. 205, in which it is said, at page 674:

"Touching the provision that in prosecutions, by indictment or otherwise, the State need not, in the first instance, prove that the defendant has not the permit required by the statute, we may remark that, if it has any application to a proceeding like this, it does not deprive him of the presumption that he is innocent of any violation of law. It is only a declaration that when the State has proven that the place described is kept and maintained for the maufacture or sale of intoxicating liquors—such manufacture or sale being unlawful except for specified purposes, and then only under a permit—the prosecution need not prove a negative, namely, that the defendant has not the required license or permit. If the defendant has such license or permit, he can easily produce it, and thus overthrow the *prima facie* case established by the State."

It should also be remembered that the petitioners did not introduce in evidence merely the divorce decree, they went further and introduced parts of the Record in the divorce proceedings. The State of North Carolina was entitled to rely on or to use any of the evidence introduced by the petitioners in the trial below. STATE v. BROWN, 218 N. C. 415.

The trial judge, in accordance with settled local procedure, instructed the jury that the burden of establishing their defenses was on the defendants (petitioners here) that both the evidence of the prosecution and the evidence of the defendants could be considered; and that the recitals in the divorce decrees that the plaintiffs in the divorce actions were *bona fide* residents or domiciliaries of Nevada were *prima facie* evidence of such facts.

These questions being disposed of in accordance with settled local procedure, no question is presented for decision by this Court.

VAN OSTER v. KANSAS, 272 U. S. 465, 71 L. ed. 354;
LIBERTY WAREHOUSE CO. v. BURLEY TOBACCO CO-OP M. ASSOCIATION, 276 U. S. 71, 72 L. ed. 473;
UNITED GAS PUBLIC SERVICE CO. v. TEXAS, 303 U. S. 123, 82 L. ed. 702.

III

THE NORTH CAROLINA STATUTE UNDER WHICH PETITIONERS WERE PROSECUTED IS NOT UNCONSTITUTIONAL.

The petitioners were convicted of bigamous cohabitation in violation of Section 14-183 of the General Statutes of North Carolina, the pertinent provision of which reads as follows:

"If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony . . . Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . . "

If the attack upon the validity of the North Carolina statute is to be considered as incidental to the argument that North Carolina was required to recognize the Nevada divorce decrees under the full faith and credit clause, it seems a sufficient answer to say that recognition was not required under BELL v. BELL, 181 U. S. 175, 45 L. ed. 804, and the other authorities cited and discussed.

It can hardly be questioned that the police power of a state is sufficiently broad to allow the enactment of legislation designed for the protection of a relationship so intimately

connected with the public health, safety and morality as the marital relationship. It can hardly be questioned that a state validly can enact laws providing for the punishment of those who, without being legally married according to the laws of the state, live and cohabit together as man and wife. Such is the purpose of the provision of Section 14-183 of the General Statutes of North Carolina now under consideration.

The statute is not, as contended by the petitioners, extra-territorial in its operation. The North Carolina Supreme Court has recognized the inability of the State to punish for bigamy persons who are parties to a marriage ceremony celebrated outside the State. STATE v. BARNETT, 83 N. C. 615. But the conduct which the statute in question prohibits is the cohabitation which takes place within the borders of North Carolina. The Supreme Court of North Carolina held this statute constitutional in STATE v. MOON, 178 N. C. 715, 100 S. E. 615. In writing the opinion, Justice Brown stated:

"It is further contended that the amendment of 1913 is unconstitutional inasmuch as its effect is to punish the defendant for a crime committed outside of the territorial limits of the State. This contention cannot be sustained. It is an offense committed in North Carolina called bigamous cohabitation. Similar statutes have been enacted in the States of Alabama, Iowa, Massachusetts, Minnesota, Missouri, Tennessee, and Vermont, and in each of these states they have been sustained.

"In Alabama, COX v. STATE, 117 Ala. 103, 67 Am. S. R. 166, 44 L. R. A. 760.

"In Iowa, S. v. STEUPPER, 117 Iowa 591, S. v. SLOAN, 55 *ib.*, 217.

"In Massachusetts, COM. v. BRADLEY, 2 Cush. 553.

"In Minnesota, S. v. JOHNSON, 12 Minn. 467, 93 Am.D. 241.
"In Missouri, S. v. STEWART, 194 Mo. 345, 5 Ann. Cas. 963.
"In Tennessee, KENNEVAL v. STATE, 107 Tenn. 581
"In Vermont, S. v. PALMER, 18 Vt. 570."
To the same effect:
PEOPLE v. ELLIS (California), 266 P. 518;
EX PARTE GRESHAM (Oklahoma), 12 P. (2d) 709.
In PEOPLE v. ELLIS, *supra*, it is said:

"The power of the Legislature to so protect society against such an immoral act cannot be questioned."

In so far as the defendants' claim that the statute is unconstitutional relates to the Fourteenth Amendment, it should be remembered that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requisite is satisfied. Due process is so secured by laws operating on all alike and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of right and distributive justice. CALDWELL v. TEXAS, 137 U. S. 697, 34 L. ed. 816.

The State is traditionally the protector of the lives, liberties and property of its own people and the courts of North Carolina have always been vigilant in upholding "due process of law," which means such an exertion of power of government as settled maxims of law sanction and under such safeguards for protection of individual rights as those maxims prescribe.

IV

THE QUESTIONS OF POLICY POSED BY THE PETITIONERS ARE MATTERS WHICH OUGHT TO BE DECIDED BY THE STATES.

The petitioners argue at considerable length that the judgment of the Supreme Court of North Carolina ought to be reversed because it is bad social policy for recognition to be denied to foreign divorce decrees. It is contended that havoc will be created "among literally thousands of married couples throughout the United States" if it is held that the Nevada divorce decrees in question are not entitled to full faith and credit. Let us not forget that the question before this Court is not whether state courts *should* recognize divorce decrees of the type under consideration, but whether the full faith and credit clause of the Federal Constitution *compels* them to so so.

Whatever havoc and consternation might arise among married couples if the judgment of the Supreme Court of North Carolina should be affirmed would be the direct result of disregard for the law as it has been declared by our courts for many years. It will be no innovation to hold that a divorce granted in a state where neither spouse is domiciled and in which the defendant is not personally served and makes no appearance is not entitled to full faith and credit.

If the decision of this case involves matters of policy, it is to be remembered that there are arguments based on policy which may be appropriately advanced by both sides. The dissolution of the bonds of matrimony is a serious matter. Surely no one will contend that respect for the sanctity of the marital relationships is engendered by the unseemly spectacle of married persons, upon sudden or trivial provocation, departing from the state of their domicile, establishing a fictitious residence for the sole purpose of getting a divorce, and securing a decree in a state which operates "divorce

mills" as a commercial racket and which is usually so far away as to make it inconvenient for the other spouse to make an appearance. Who can say whether the greater wisdom is in the policy of protecting the marital status of those who have relied on foreign divorces or in the policy of compelling respect for the seriousness of marriage and discouraging its hasty dissolution through non-recognition of *ex parte* migratory divorces, such as those under consideration?

While the full faith and credit clause does not apply to divorce decrees rendered by the courts of a foreign country, the following quotation from Senor Vincente Estrada Cajigal, at the time the Governor of the State of Morelos, shows clearly how "divorce mills" are generally regarded.

"'I have been studying the situation at Reno, and I admit that we need some improvement here in Morelos. We intend to improve our present divorce procedures in many ways, several of which will appeal to our customers. I say customers, for I consider the divorce industry purely in the light of a commercial transaction, as an operation in buying and selling. We have a law to sell and it is our responsibility to render purchase as easy and rapid for customers as possible. In our calculations we are eliminating all consideration of months or even weeks and plan to work out a schedule on a basis of days, and as few of them as may be imaginable. *We are aiming at a maximum of ten days. If Reno meets that, we shall cut the time still lower.*'" 17 Minnesota Law Review, 638, at pages 643, 644.

It is assumed by the State of North Carolina that these matters of policy are questions which will be left to the courts and legislatures of the various states and that the Supreme

Court of the United States will concern itself only with the proper interpretation of the full faith and credit clause.

Respectfully submitted,

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J. E. TUCKER,
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PETITION FOR REHEARING

Supreme Court, U. S.
FILED
JUN 14 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR REHEARING

W. H. STRICKLAND,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

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THE STATE OF NORTH CAROLINA

PETITION FOR REHEARING

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the petitioners, O. B. Williams and Lillie Shaver Hendrix, through their counsel of record, and petition the Court that they be granted a re-hearing of the decision rendered in the above entitled cause of action on May 21, 1945, and would respectfully show unto the Court the following.

1

That your petitioners presented, for determination, the constitutionality of Section 14-183 of the General Statutes of North Carolina under which your petitioners were indicted; that the Court did not pass upon the constitutionality of said Statute and that your petitioners verily believe

that they are entitled to have the constitutionality of said Statute determined.

2

That your petitioners desire a re-hearing of this cause for the reason that the opinion rendered on May 21, 1945, leaves the problem involved in a state of speculation and conjecture for the following reasons, to-wit: the decision in *Williams* v. *North Carolina*, 317 U. S. 287, specifically overruled *Haddock* v. *Haddock*, while the opinion rendered May 21, 1945, does not overrule the prior decision in the identical question reported 317 U. S. 287, nor does it purport to re-establish *Haddock* v. *Haddock*. Thus there are two contrary decisions in the identical case and on the identical facts, involving the identical subject matter and the identical parties. Neither the legal profession nor the layman can, under these circumstances, determine what is the law. *Bell* v. *Bell*, 181 U. S. 175, is not applicable to the case at bar for the reason that there the matter involved was a civil right, whereas in the case at bar the question involved is a matter of criminal prosecution and involves the liberty of your petitioners. Moreover, in *Bell* v. *Bell*, the burden of challenging the divorce decree was cast upon the party attacking the divorce decree, whereas in the case at bar the burden has been cast upon your petitioners to prove their innocence, notwithstanding the fact that the law of the land presumes every person to be innocent in a criminal prosecution until the state has proven such person guilty beyond a reasonable doubt. In the case at bar, the trial court, the Supreme Court of North Carolina; and now this Court has inferred that the residence of your petitioners in Nevada was a sham and a fraud, notwithstanding the fact that the Nevada courts received evidence upon the question of the good faith of your petitioners' residence in the State of Nevada and determined, as a matter of fact,

that your petitioners were bona fide residents in the State of Nevada, while the State of North Carolina was not required to produce any evidence challenging that adjudication of the question of fact, thus casting the burden upon your petitioners to prove their innocence.

3

The opinion sought to be re-heard involves a misapplication of the provisions of the full faith and credit clause of the Constitution of the United States and the Act of Congress adopted pursuant thereto, for the reason that divorce decrees are not excluded from the provisions of either the full faith and credit clause or the Act of Congress.

4

The sovereign state should be as equally bound by its admissions as are individuals. In the hearing of this cause when it was first before the Court, the sovereign State of North Carolina admitted that there was sufficient evidence in the record to establish at least a colorable bona fide domicile in the State of Nevada. On the second hearing, North Carolina retracted that admission, but offered no evidence challenging the bona fides of the Nevada domicile of your petitioners. The sovereign State of North Carolina should not be permitted to "take two bites at the same cherry." That is the effect of the two opinions in this cause.

5

The present opinion, filed May 21, 1945, leaves the question of marriage and divorce in the realm of uncertainty. In the light of the two decisions in the identical case, it is impossible for counsel to advise clients with any degree of certainty as to when they may be able to procure a valid

and legal decree dissolving the bonds of matrimony. In the interest of the national public good this situation should be clarified.

6

The reasoning of the majority opinion does not support the conclusion and result reached by the Court, for example, "'The Constitution did not mean to confer (upon the States) a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'" In short, the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of "comity".'" The evidence in this record shows that your petitioners were residents of Nevada at the time of the rendition of the divorce decrees, and had complied with the respective requirements at the time of the rendition of the divorce decrees. The State of North Carolina offered no evidence that the petitioners were not residents of Nevada fully in accordance with Nevada laws at the time of the rendition of the decrees, but that the State of North Carolina only inferred, in the absence of evidence, that the petitioners were not residents of the State of Nevada.

Then again it is stated in the majority opinion, "A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.'"

The net result of the majority opinion is a denial of the right of Nevada to render a binding decree for people who have met the residence requirements of said State.

Then again, the majority opinion states, "The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted."

Yet the majority opinion denies Nevada that right and at the same time imposes upon the State of Nevada the bigamous cohabitation statute under which these petitioners were indicted, irrespective of the fact that they had met the residence requirements of the State of Nevada. Residence and domicile is a matter of intention and the only evidence of intention on the part of the petitioners offered either by the State or the petitioners was the testimony before the Nevada court and the finding of fact by the Nevada court that the petitioners were bona fide residents of said State.

Then again, the majority opinion states, "Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises."

Yet the majority opinion denies the courts of the State of Nevada to exercise these self-same principles. Under the ruling of the court, it would be necessary for every divorced person to relitigate the good faith of their residence in the divorcing state in every state of the union whereby they might perchance sojourn. This creates an intolerable situation with respect to the marriage and divorce laws. In addition thereto, the majority opinion places North Carolina in a situation of being permitted to reject one part of the transaction in Nevada and accept the other part of the transaction, that is, it permits North Carolina to reject the divorce decree granted by the State of Nevada and at the same time accept the validity of the marriage contract made between the petitioners in the State of Nevada. This conclusion is inevitable for the reason that unless North Carolina accepts the marriage entered

into in the State of Nevada, then the petitioners could not be guilty of anything more than plain, ordinary adultery. If North Carolina accepts one part of the transaction, it should be required to accept the other part of the transaction. Under North Carolina's loose construction of the statute involved, the said statute may apply equally as well to citizens who have never lived in North Carolina prior to the taking up of a new residence in North Carolina and indictment for bigamous cohabitation.

Then again the majority opinion states, "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties."

This statement seems to indicate that in order for a divorce decree to be binding, the other forty-seven states in their sovereign capacity must be made party defendants to every divorce action instituted and prosecuted to a conclusion. The American people are a transient people and they move freely from one state to another, and it would be ridiculous for party litigants to a divorce action to relitigate the bona fides of their residence in every state in which they might chance to sojourn, or to make every state party to a divorce action. In fact, such a situation is impossible for the reasons that individuals are not permitted to sue the state. Likewise, it is not a sound proposition of law to hold that no state is bound by a decree of divorce when service of process has been had in accordance with the laws of the respective state and in accordance with due process, for the reason that such a holding would undermine every single divorce decree granted in any of the courts of the United States where service was had by publication.

Then again, the majority opinion holds on page 4, "On the contrary, it is open to the courts of any State in the

trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased."

In the case at bar, no evidence was introduced by the State of North Carolina, which was the attacking party, to the effect that the petitioners had not established a domicile in the State of Nevada, but only inferred as much.

It is to be observed that there was no issue of fraud upon the jurisdiction of the State of Nevada and therein the majority opinion is faulty in assuming fraud upon the jurisdiction of the Nevada courts.

Then again, on page 5 of the majority opinion it is stated, "All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question."

Yet the conclusion of the majority opinion repudiates this very principle of law.

Then again the majority opinion states, "What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant."

The conclusion of the majority opinion is exactly the opposite from this principle of law. Since the State of North Carolina offered no evidence challenging the bona fide residence of the petitioners in Nevada but, on the contrary, in the absence of evidence as will be hereinafter pointed

out, inferred and concluded that the petitioners had established no bona fide residence in the State of Nevada but "inferred" that the residence was not bona fide.

If this decision is permitted to stand, then the State of North Carolina or any other of the forty-seven states may infer and "conclude" without the production of any evidence, that any kind of a judgment of a sister state is void for the lack of a bona fide domicile or void for lack of jurisdiction.

Courts cannot make findings of fact in the absence of evidence. If we are to permit such procedure, then life in the United States will be no different from that existing in the now crushed Germany under the Hitler regime. If no respect be given to the judicial proceedings of the courts of any state of the union, then there is little hope for the freedom of the American people and little hope for the civil rights of the American people under the mandate of the Constitution.

Then again on page 9, the majority opinion says, "And so we cannot say that North Carolina was not entitled to *draw the inference that petitioners* never abandoned their domiciles in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court."

This ruling inaugurates a new and unsound principle of law since it permits the State, in a criminal prosecution, to infer and conclude in the absence of evidence that the defendants (petitioners here) are guilty and, casts upon the defendants (petitioners here) the burden of proving their innocence.

Then referring to the concurring opinion of Mr. Justice Murphy on page 1 of the opinion, the following is adopted as the correct principle of law.

"The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders."

"But if Nevada's divorce decrees are to be accorded full faith and credit in the courts of her sister states it is essential that Nevada have proper jurisdiction over the divorce proceedings. This means that at least one of the parties to each ex parte proceeding must have a bona fide domicil within Nevada for whatever length of time Nevada may prescribe."

Obviously, the ultimate conclusion of the majority opinion is contrary to this principle of law and should be clarified.

8

Then again Mr. Justice Murphy states, "This means, in other words, that the jury found that the petitioners' residence in Nevada for six weeks was not accompanied by a bona fide intention to make Nevada their home and to remain there permanently or at least for an indefinite time, as required even by Nevada law."

And this was done, notwithstanding the fact that the Nevada Courts concluded exactly the opposite on competent evidence before it, whereas North Carolina offered no evidence challenging the good faith of their residence in Nevada but "concluded" that there was no bona fide residence.

Does this opinion mean that the courts of the land are abandoning the fundamental principle of law that every person charged with crime is presumed to be innocent until proven guilty beyond a reasonable doubt? Apparently that is what the majority opinion holds. A careful analysis will

permit of no other conclusion. It now appears to be that at least under this opinion persons who have been divorced and contracted a marriage in another state are presumed to be guilty of bigamous cohabitation if they perchance move to some other state.

It is to be observed that contrary to the mention of six weeks' residence, these petitioners remained in Nevada for a period of more than five months.

Then again on page 3 of Mr. Justice Murphy's opinion, it is stated, (a) those effective solely within the borders of Nevada and (b) those effective everywhere on the ground that at least one of the parties had a bona fide domicil in the state at the time the decree was granted. Neither type of divorce is involved here. And Nevada has no interest that we can respect in issuing divorce decrees with extraterritorial effect to those who are domiciled elsewhere and who secure sham domicils in Nevada solely for divorce purposes."

The record does not dispute the fact that the petitioners were in Nevada and that they had acquired a residence there fully in accord with the Nevada statutes and pursuant thereto, Nevada dissolved the bonds of matrimony and ratified a marriage contract between the petitioners, which admittedly is valid in Nevada.

Who shall determine the persons who are legal residents of Nevada, the State of Nevada or the State of North Carolina?

If North Carolina be permitted to determine by its own tribunals when persons are legal residents of any other state in the union, then no judgment is secure and the effect of the majority opinion will serve only to confuse every field

of litigation and result in strife, turmoil, confusion and uncertainty among the legal profession as well as litigants.

On page 4 of Mr. Justice Murphy's concurring opinion, reference is made to *State* v. *Herron*, 175 N. C. 754. A careful examination of that opinion will show that the burden was cast upon the State to prove that the defendant had not established a bona fide residence in the State of Georgia. The State carried the burden in that case by showing that the defendant, immediately after instituting his divorce action in Georgia, returned to the City of Asheville, North Carolina and there conducted his business in the usual manner until the time his Georgia divorce action was called for trial. The same principle was applied in *Bell* v. *Bell*, *supra*, but that principle has been denied these petitioners in the present action and the new principle now proposed to be adopted is unjust and contrary to the fundamental laws of the land in that it places upon the defendants (petitioners here) the burden of proving their innocence.

After diligent search, your petitioners have been unable to find any legal precedent in the judicial history of this country supporting such a proposition.

Wherefore, it is respectfully prayed that a re-hearing be granted to the end in view that your petitioners may receive justice in accordance with the long established principles of the fundamental law of the land.

W. H. Stickland,
Attorney for Petitioners.

Certificate

I, W. H. Strickland, counsel of record for the above named petitioners, do hereby certify that the foregoing petition for re-hearing is filed in good faith and for what I

believe to be a meritorious cause and that the same is not filed for the purpose of delay or procrastination.

This the 9th day of June, 1945.

W. H. STICKLAND.

Sworn and subscribed to before me this the 9th day of June, 1945.

DOROTHY TATE,
Notary Public.

My commission expires February 5, 1946.

(8724)

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1944.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, *vs.* The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[May 21, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This case is here to review judgments of the Supreme Court of North Carolina, affirming convictions for bigamous cohabitation,[1] assailed on the ground that full faith and credit, as required by the Constitution of the United States, was not accorded divorces decreed by one of the courts of Nevada. *Williams* v. *North Carolina*, 317 U. S. 287, decided an earlier aspect of the controversy. It was there held that a divorce granted by Nevada, on a finding that one spouse was domiciled in Nevada, must be respected in North Carolina, where Nevada's finding of domicil was not questioned, though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina. The record then before us did not present the question whether North Carolina had the power "to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada." *Williams* v. *North Carolina*, *supra* at 302. This is the precise issue which has emerged after retrial of the cause following our reversal. Its obvious importance brought the case here. 322 U. S. 725.

The implications of the Full Faith and Credit Clause, Article IV, Section 1 of the Constitution,[2] first received the sharp analysis

[1] The prosecution was under § 14-183 of the General Statutes of North Carolina (1943): "If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend . . . to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage . . . ."

[2] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

of this Court in *Thompson* v. *Whitman*, 18 Wall. 457. Theretofore, uncritical notions about the scope of that Clause had been expressed in the early case of *Mills* v. *Duryee*, 7 Cranch 481. The "doctrine" of that case, as restated in another early case, was that "the judgment of a state court should have the same credit, validity, and effect, in every other court in the United States, which it had in the state where it was pronounced". *Hampton* v. *M'Connel*, 3 Wheat. 234, 235. This utterance, when put to the test, as it was in *Thompson* v. *Whitman*, *supra*, was found to be too loose. *Thompson* v. *Whitman* made it clear that the doctrine of *Mills* v. *Duryee* comes into operation only when, in the language of Kent, "the jurisdiction of the court in another state is not impeached, either as to the subject matter or the person". Only then is "the record of the judgment . . . entitled to full faith and credit". 1 Kent, Commentaries (2d ed., 1832) * 261 n. b. The essence of the matter was thus put in what *Thompson* v. *Whitman* adopted from Story: "'The Constitution did not mean to confer [upon the States] a new power or jurisdiction, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory.'"[3] 18 Wall. 457, 462. In short, the Full Faith and Credit Clause puts the Constitution behind a judgment instead of the too fluid, ill-defined concept of "comity".[4]

But the Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention. 2 Farrand, The Records of the Federal Convention of 1787, 447-48.[5] "To give it the force of a judgment in another state, it must be made a judgment there". *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 325. It can be made a judgment there only if the court purporting to render the original judgment had

[3] It is interesting to note that this more critical analysis by Mr. Justice Story of the nature of the Full Faith and Credit Clause first appeared in 1833, twenty years after his loose characterization in Mills v. Duryee, *supra*. 3 Story, Commentaries on the Constitution (1st ed., 1833) p. 183.

[4] "There is scarcely any doctrine of the law which, so far as respects formal and exact statement, is in a more unreduced and uncertain condition than that which relates to the question what force and effect should be given by the courts of one nation to the judgments rendered by the courts of another nation." James C. Carter and Elihu Root, Appellants' brief, p. 49, in Hilton v. Guyot, 159 U. S. 113. See, as to "comity", Loucks v. Standard Oil Co., 224 N. Y. 99.

[5] The reach of Congressional power given by Art. IV, § 1 is not before us. See Jackson, Full Faith and Credit—the Lawyer's Clause of the Constitution (1945) 45 Col. L. Rev. 1, 21-24; Cook, Logical and Legal Bases of Conflict of Laws (1942) 98 *et seq.*

power to render such a judgment. A judgment in one State is conclusive upon the merits in every other State, but only if the court of the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.

"It is too late now to deny the right collaterally to impeach a decree of divorce made in another State, by proof that the court had no jurisdiction, even when the record purports to show jurisdiction". It was "too late" more than forty years ago. *German Savings Society* v. *Dormitzer*, 192 U. S. 125, 128.

Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. *Bell* v. *Bell*, 181 U. S. 175; *Andrews* v. *Andrews*, 188 U. S. 14. The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. In view of *Williams* v. *North Carolina*, *supra*, the jurisdictional requirement of domicil is freed from confusing refinements about "matrimonial domicil", see *Davis* v. *Davis*, 305 U. S. 32, 41, and the like. Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.

It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. *Forsyth* v. *Hammond*, 166 U. S. 506, 517; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 30; *Davis* v. *Davis*, *supra*. But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the

record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.[6]

These considerations of policy are equally applicable whether power was assumed by the court of the first State or claimed after inquiry. This may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is inherent in the practical application of the concept of domicil in the context of our federal system.[7] See *Worcester County Co.* v. *Riley*, 302 U. S. 292; *Texas* v. *Florida*, 306 U. S. 398; *Dist. of Columbia* v. *Murphy*, 314 U. S. 441. What was said in *Worcester County Co.* v. *Riley, supra*, is pertinent here, "Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries." 302 U. S. 292, 299. If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. This Court has long ago denied the existence of such destructive power. The issue has a far reach. For domicil is the foundation of probate jurisdiction precisely as it is that of divorce. The ruling in *Tilt* v. *Kelsey*, 207 U. S. 43, regarding the probate of a will, is equally applicable to a sister-State divorce decree: "the full faith and credit due to the proceedings of the New Jersey court do not require that the courts of New York shall be bound by its adjudication on the question of domicil. On the contrary, it is open to the courts of any State in the trial of a collateral issue to determine upon the evidence produced the true domicil of the deceased." 207 U. S. 43, 53.

Although it is now settled that a suit for divorce is not an ordinary adversary proceeding, it does not promote analysis, as

[6] We have not here a situation where a State disregards the adjudication of another State on the issue of domicil squarely litigated in a truly adversary proceeding.

[7] Since an appeal to the Full Faith and Credit Clause raises questions arising under the Constitution of the United States, the proper criteria for ascertaining domicil, should these be in dispute, become matters for federal determination. See Hinderlider v. La Plata Co., 304 U. S. 92, 110.

was recently pointed out, to label divorce proceedings as actions *in rem*." *Williams* v. *North Carolina, supra* at 297. But insofar as a divorce decree partakes of some of the characteristics of a decree *in rem*, it is misleading to say that all the world is party to a proceeding *in rem*. See *Brigham* v. *Fayerweather*, 140 Mass. 411, 413, quoted in *Tilt* v. *Kelsey, supra* at 52. All the world is not party to a divorce proceeding. What is true is that all the world need not be present before a court granting the decree and yet it must be respected by the other forty-seven States provided—and it is a big proviso—the conditions for the exercise of power by the divorce-decreeing court are validly established whenever that judgment is elsewhere called into question. In short, the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable.

But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a new domicil within the divorcing State would, in the proper functioning of our federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State.

The problem is to reconcile the reciprocal respect to be accorded by the members of the Union to their adjudications with due regard for another most important aspect of our federalism, whereby "the domestic relations of husband and wife . . . were matters reserved to the states," *Popovici* v. *Agler*, 280 U. S. 379, 383-84, and do not belong to the United States. *In re Burrus*, 136 U. S. 586, 593-94. The rights that belong to all the States and the obligations which membership in the Union imposes upon all, are made effective because this Court is open to consider claims, such as this case presents, that the courts of one State have not given the full faith and credit to the judgment of a sister State that is required by Art. IV, § 1 of the Constitution.

But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicil. "It is not for us to retry the facts", as was held in a case in which, like the present, the jurisdiction underlying a sister-State judgment was dependent on domicil. *Burbank* v. *Ernst*, 232 U. S. 162, 164. The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment.

What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to award a divorce decree cannot, we have seen, foreclose reexamination by another State. Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. *Thompson* v. *Whitman*, *supra*. If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we can not upset the judgment before us. And we cannot do so even if we also found in the record of the court of original judgment warrant for its finding

that it had jurisdiction. If it is a matter turning on local law, great deference is owed by the courts of one State to what a court of another State has done. See *Michigan Trust Co.* v. *Ferry*, 228 U. S. 346. But when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of a court of another State which finds an absence of domicil where such a conclusion is warranted by the record.

When this case was first here, North Carolina did not challenge the finding of the Nevada court that petitioners had acquired domicils in Nevada. For her challenge of the Nevada decrees, North Carolina rested on *Haddock* v. *Haddock*, 201 U. S. 562. Upon retrial, however, the existence of domicil in Nevada became the decisive issue. The judgments of conviction now under review bring before us a record which may be fairly summarized by saying that the petitioners left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as each had done so and married one another they left Nevada and returned to North Carolina to live there together as man and wife. Against the charge of bigamous cohabitation under § 14-183 of the North Carolina General Statutes, petitioners stood on their Nevada divorces and offered exemplified copies of the Nevada proceedings.[8] The trial judge charged that the State had the burden of proving beyond a reasonable doubt that (1) each petitioner was lawfully married to one person; (2) thereafter each petitioner contracted a second marriage with another person outside North Carolina; (3) the spouses of petitioners were living at the time of this second marriage; (4) petitioners cohabited with one another in North Carolina after the second marriage. The burden, it was charged, then devolved upon petitioners "to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy" the jury from all the evidence, that petitioners were domiciled in Nevada at the time they obtained their divorces. The court further charged that "the recitation" of

[8] As to petitioner Hendrix these included the pleadings, evidence and decree. As to petitioner Williams essentially the same evidence with respect to his domicil is in the record from witnesses in this case. It shows when Williams left North Carolina, when he arrived in Nevada, the prompt filing of his divorce suit (Nevada requires six weeks' residence prior to filing a suit for divorce), marriage to petitioner Hendrix immediately after petitioners were divorced, and his prompt return to North Carolina. All of this bears on abandonment of the North Carolina domicil and the intent to remain indefinitely elsewhere.

bona fide domicil in the Nevada decree was "prima facie evidence" sufficient to warrant a finding of domicil in Nevada but not compelling "such an inference". If the jury found, as they were told, that petitioners had domicils in North Carolina and went to Nevada "simply and solely for the purpose of obtaining" divorces, intending to return to North Carolina on obtaining them, they never lost their North Carolina domicils nor acquired new domicils in Nevada. Domicil, the jury was instructed, was that place where a person "has voluntarily fixed his abode . . . 'not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time."

The scales of justice must not be unfairly weighted by a State when full faith and credit is claimed for a sister-State judgment. But North Carolina has not so dealt with the Nevada decrees. She has not raised unfair barriers to their recognition. North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence.

State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. *Norris* v. *Alabama*, 294 U. S. 587, 590. This record is barren of such attempted evasion. What it shows is that petitioners, long-time residents of North Carolina, came to Nevada, where they stayed in an auto-court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live. It cannot reasonably be claimed that one set of inferences rather than another regarding the acquisition by petitioners of new domicils in Nevada could not be drawn from the circumstances attending their Nevada divorces. It would be highly unreasonable to assert that a jury could not reasonably find that the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina. Such an intention, the trial court properly charged, would preclude acquisition of domicils in Nevada. See *Williamson* v. *Osenton*,

232 U. S. 619. And so we can not say that North Carolina was not entitled to draw the inference that petitioners never abandoned their domicils in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court.

If a State cannot foreclose, on review here, all the other States by its finding that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a federal system in which regulation of domestic relations has been left with the States and not given to the national authority. But the occasional disregard by any one State of the reciprocal obligations of the forty-eight States to respect the constitutional power of each to deal with domestic relations of those domiciled within its borders is hardly an argument for allowing one State to deprive the other forty-seven States of their constitutional rights. Relevant statistics happily do not justify lurid forebodings that parents without number will disregard the fate of their offspring by being unmindful of the status of dignity to which they are entitled. But, in any event, to the extent that some one State may, for considerations of its own, improperly intrude into domestic relations subject to the authority of the other States, it suffices to suggest that any such indifference by a State to the bond of the Union should be discouraged not encouraged.

In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage. The petitioners therefore assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada. Since the divorces which they sought and received in Nevada had no legal validity in North Carolina and their North Carolina spouses were still alive, they subjected themselves to prosecution for bigamous cohabitation under North Carolina law. The legitimate finding of the North Carolina Supreme Court that the petitioners were not in truth domiciled in Nevada was not a contingency against which the

petitioners were protected by anything in the Constitution of the United States. A man's fate often depends, as for instance in the enforcement of the Sherman Law, on far greater risks that he will estimate "rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash* v. *United States*, 229 U. S. 373, 377. The objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law has more than once been overruled. In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State in punishing particular acts may provide that "he who shall do them shall do them at his peril and will not be heard to plead in defence good faith or ignorance." *United States* v. *Balint*, 258 U. S. 250, 252, quoting *Shevlin-Carpenter Co.* v. *Minnesota*, 218 U. S. 57, 69-70. Mistaken notions about one's legal rights are not sufficient to bar prosecution for crime.

We conclude that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domicils in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations. And, as was said in connection with another aspect of the Full Faith and Credit Clause, our conclusion "is not a matter to arouse the susceptibilities of the States, all of which are equally concerned in the question and equally on both sides." *Fauntleroy* v. *Lum*, 210 U. S. 230, 238.

As for the suggestion that *Williams* v. *North Carolina*, *supra*, foreclosed the Supreme Court of North Carolina from ordering a second trial upon the issue of domicil, it suffices to refer to our opinion in the earlier case.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1944.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, *vs.* The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[May 21, 1945.]

Mr. Justice Murphy, concurring.

While I join in the opinion of the Court, certain considerations compel me to state more fully my views on the important issues presented by this case.

The State of Nevada has unquestioned authority, consistent with procedural due process, to grant divorces on whatever basis it sees fit to all who meet its statutory requirements. It is entitled, moreover, to give to its divorce decrees absolute and binding finality within the confines of its borders.

But if Nevada's divorce decrees are to be accorded full faith and credit in the courts of her sister states it is essential that Nevada have proper jurisdiction over the divorce proceedings. This means that at least one of the parties to each ex parte proceeding must have a bona fide domicil within Nevada for whatever length of time Nevada may prescribe.

This elementary principle has been reiterated by this Court many times. In *Bell* v. *Bell*, 181 U. S. 175, this Court held that "because neither party had a domicil in Pennsylvania" the Pennsylvania court had no jurisdiction to grant a divorce and its decree "was entitled to no faith and credit in New York or in any other state." The same rule was applied in the companion case of *Streitwolf* v. *Streitwolf*, 181 U. S. 179. Referring to these two prior cases as holding that "domicil was in any event the inherent element upon which the jurisdiction must rest," the Court in *Andrews* v. *Andrews*, 188 U. S. 14, repeated that bona fide domicil in a state is "essential to give jurisdiction to the courts of such state to render a decree of divorce which would have extraterritorial effect." The *Andrews* case made it clear,

moreover, that this requirement of domicil is not merely a matter of state law. It was stated specifically that "without reference to the statute of South Dakota and in any event" domicil in South Dakota was necessary. 188 U. S. at 41. All of the opinions in *Haddock* v. *Haddock*, 201 U. S. 562, recognized this principle, with Mr. Justice Brown's dissenting opinion stating that "the courts of one state may not grant a divorce against an absent defendant to any person who has not acquired a bona fide domicil in that state." Finally, in *Williams* v. *North Carolina*, 317 U. S. 287, the Court acknowledged that the plaintiff's domicil in a state "is recognized in the *Haddock* case and elsewhere (Beale, Conflict of Laws, § 110.1) as essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered an appearance." See also *Atherton* v. *Atherton*, 181 U. S. 155.

The jury has here found that the petitioner's alleged domicil in Nevada was not a bona fide one, which in common and legal parlance means that it was acquired fraudulently, deceitfully or in bad faith. This means, in other words, that the jury found that the petitioners' residence in Nevada for six weeks was not accompanied by a bona fide intention to make Nevada their home and to remain there permanently or at least for an indefinite time, as required even by Nevada law. *Lamb* v. *Lamb*, 57 Nev. 421, 430. This conclusion is supported by overwhelming evidence satisfying whatever standard of proof may be propounded. Under these circumstances there is no reason to doubt the efficacy of jury trials in relation to the question of domicil or to speculate as to whether another jury might have reached a different verdict on the same set of facts.

Thus the court below properly concluded that Nevada was without jurisdiction so as to give extraterritorial validity to the divorce decrees and that North Carolina was not compelled by the Constitution to give full faith and credit to the Nevada decrees. North Carolina was free to consider the original marriages still in effect, the Nevada divorces to be invalid, and the Nevada marriage to be bigamous, thus giving the Nevada marriage the same force and effect that Nevada presumably would have given it had Nevada considered the original marriages still outstanding. Cf. *State* v. *Zichfeld*, 23 Nev. 304.

By being domiciled and living in North Carolina, petitioners secured all the benefits and advantages of its government and participated in its social and economic life. As long as petitioners and their respective spouses lived there and retained that domicil, North Carolina had the exclusive right to regulate the dissolution of their marriage relationships. However harsh and unjust North Carolina's divorce laws may be thought to be, petitioners were bound to obey them while retaining residential and domiciliary ties in that state.

No justifiable purpose is served by imparting constitutional sanctity to the efforts of petitioners to establish a false and fictitious domicil in Nevada. Such a result would only tend to promote wholesale disregard of North Carolina's divorce laws by its citizens, thus putting an end to "the existence of all efficacious power on the subject of divorce." *Andrews* v. *Andrews; supra,* 32. Certainly no policy of Nevada dictates lending the full faith and credit clause to protect actions grounded in deceit. Nevada has a recognizable interest in granting only two types of ex parte divorces: (a) those effective solely within the borders of Nevada, and (b) those effective everywhere on the ground that at least one of the parties had a bona fide domicil in the state at the time the decree was granted. Neither type of divorce is involved here. And Nevada has no interest that we can respect in issuing divorce decrees with extraterritorial effect to those who are domiciled elsewhere and who secure sham domicils in Nevada solely for divorce purposes.

There are no startling or dangerous implications in the judgment reached by the Court in this case. All of the uncontested divorces that have ever been granted in the forty-eight states are as secure today as they were yesterday or as they were before our previous decision in this case. Those based upon fraudulent domicils are now and always have been subject to later reexamination with possible serious consequences.

Whatever embarrassment or inconvenience resulting to those who have made property settlements, contracted new marriages or otherwise acted in reliance upon divorce decrees obtained under conditions found to exist in this case is not insurmountable. The states have adequate power, if they desire to exercise it, to enact legislation providing for means of validating any such property settlements or marriages or of relieving persons from other unfortunate consequences.

Nor are any issues of civil liberties at stake here. It is unfortunate that the petitioners must be imprisoned for acts which they probably committed in reliance upon advice of counsel and without intent to violate the North Carolina statute. But there are many instances of punishment for acts whose criminality was unsuspected at the time of their occurrence. Indeed, for nearly three-quarters of a century or more individuals have been punished under bigamy statutes for doing exactly what petitioners have done. *People* v. *Dawell*, 25 Mich. 247; *State* v. *Armington*, 25 Minn. 29; *People* v. *Baker*, 76 N. Y. 78; *State* v. *Westmoreland*, 76 S. C. 145. Petitioners especially must be deemed to have been aware of the possible criminal consequences of their actions in view of the previously settled North Carolina law on the matter. *State* v. *Herron*, 175 N. C. 754. This case, then, adds no new uncertainty and comes as no surprise for those who act fraudulently in establishing a domicil and who disregard the laws of their true domiciliary states.

As Mr. Justice Holmes said in his dissenting opinion in the *Haddock* case, 201 U. S. at 628, "I do not suppose civilization will come to an end whichever way this case is decided." Difficult problems inevitably arise from the fact that people move about freely among the forty-eight states, each of which has its own policies and laws. Until the federal government is empowered by the Constitution to deal uniformly with the divorce problem or until uniform state laws are adopted, it is essential that definite lines of demarcation be made as regards the scope and extent of the varying state practices. See 91 Cong. Rec. 4238-4241 (May 3, 1945). This case illustrates the drawing of one such line, a line that has been drawn many times before without too unfortunate dislocations resulting among those citizens of a divorced status. There is no reason to believe that any different or more serious consequences will result from retracing that line today.

THE CHIEF JUSTICE and MR. Justice JACKSON join in these views.

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1944.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, *vs.* The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[May 21, 1945.]

Mr. Justice Rutledge, dissenting.

Once again the ghost of "unitary domicil" returns on its perpetual round, in the guise of "jurisdictional fact," to upset judgments, marriages, divorces, undermine the relations founded upon them, and make this Court the unwilling and uncertain arbiter between the concededly valid laws and decrees of sister states. From *Bell* and *Andrews* to *Davis* to *Haddock* to *Williams* and now back to *Haddock* and *Davis* through *Williams* again[1]—is the maze the Court has travelled in a domiciliary wilderness, only to come out with no settled constitutional policy where one is needed most.

Nevada's judgment has not been voided. It could not be, if the same test applies to sustain it as upholds the North Carolina conviction.[2] It stands, with the marriages founded upon it, unimpeached. For all that has been determined or could be, unless another change is in the making, petitioners are lawful husband and wife in Nevada. *Williams* v. *North Carolina I*, 317 U. S. 287; *Williams* v. *North Carolina II*, decided this day. They may be such everywhere outside North Carolina. Lawfully wedded also, in North Carolina; are the divorced spouse of one and his wife, taken for all we know in reliance upon the Nevada decree.[3]

[1] Cf. text *infra* Part I.

[2] Presumably it would be our function "to retry the facts" no more if the Nevada decree were immediately under challenge here than it is to do so when the North Carolina judgment is in issue. It would seem therefore that we owe the same deference to Nevada's finding of domicil as we do to North Carolina's. Cf. text at note 4 *et seq.*

[3] The record indicates that Mr. Hendrix "had brought no divorce proceeding against the *feme* defendant prior to the first trial of this cause, but that he has since and remarried." Although the evidence shows institution of this proceeding, it does not show a decree was entered prior to

That is, unless another jury shall find they too are bigamists for their reliance. No such jury has been impanelled. But were one called, it could pronounce the Nevada decree valid upon the identical evidence from which the jury in this case drew the contrary conclusion. That jury or it and another, if petitioners had been tried separately, could have found one guilty, the other innocent, upon that evidence unvaried by a hair. And, by the Court's test, we could do nothing but sustain the contradictory findings in all these cases.

I do not believe the Constitution has thus confided to the caprice of juries the faith and credit due the laws and judgments of sister states. Nor has it thus made that question a local matter for the states themselves to decide. Were all judgments given the same infirmity, the full faith and credit clause would be only a dead constitutional letter.

I agree it is not the Court's business to determine policies of divorce. But precisely its function is to lay the jurisdictional foundations upon which the states' determinations can be made effective, within and without their borders. For in the one case due process, in the other full faith and credit, commands of equal compulsion upon the states and upon us, impose that duty.

I do not think we perform it, we rather abdicate, when we confide the ultimate decision to the states or to their juries. This we do when, for every case that matters, we make their judgment conclusive. It is so in effect when the crucial concept is as variable and amorphous as "domicil," is always a conclusion of "ultimate fact," and can be established only by proof from which, as experience shows, contradictory inferences may be made as strikes the local trier's fancy. The abdication only becomes more obviously explicit when we avowedly confess that the faith and credit due may be determined either way, wherever "it cannot reasonably be claimed that one set of inferences rather than another" could not be drawn concerning the very matter determined by the judgment; and the final choice upon such a balance is left with the local jury.

No more unstable foundation, for state policies or marital relations, could be formulated or applied. In no region of adjudi-

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his remarriage. Whether or not he actually relied upon the Nevada decree, thousands of spouses so divorced do so rely, thus founding new relations which are equally subject to invalidation by jury finding and are always beclouded by a judgment like that rendered in this case.

cation or legislation is stability more essential for jurisdictional foundations. Beyond abnegating our function, we make instability itself the constitutional policy when the crux is so conceived and pivoted.

I.

What, exactly are the effects of the decision? The Court is careful not to say that Nevada's judgment is not valid in Nevada. To repeat, the Court could not so declare it, unless a different test applies to sustain that judgment than supports North Carolina's. Presumably the same standard applies to both; and each state accordingly is free to follow its own policy, wherever the evidence, whether the same or different, permits conflicting inferences of domicil, as it always does when the question becomes important.[4]

This must be true unless, contrary to the disclaimer, this Court itself is "to retry the facts." The Court no more could say that the Nevada evidence permitted no conclusion of domicil there than it now can say the North Carolina evidence would not allow a finding either way. This apparently is conceded. The proof was not identical. But it was not so one-sided in either case that only one conclusion was compelled. The evidence in Nevada was neither that strong nor that weak.[5] Seldom, if ever, is it so.

The necessary conclusion follows that the Nevada decree was valid and remains valid within her borders. So the marriage is good in Nevada, but void in North Carolina, just as it was before "the jurisdictional requirement of domicil [was] freed from confusing refinements about 'matrimonial domicil,' see *Davis* v. *Davis*, 305 U. S. 32, 41, and the like." See also *Haddock* v. *Haddock*, 201 U. S. 562.

The characterization "in rem" has been dropped. But it is clear from the result and from the opinion that the more "confusing refinements" and consequences, including the anomalous status *Haddock* approved, have not completely disappeared. We are not told definitely whether Nevada's adjudication or North

[4] Cf. text at notes 2, 5, 7, 9, 11 *et seq.*

[5] The Nevada court knew that petitioners recently had come from North Carolina, resided in tourist quarters, an auto court, and by inference at least that they had come together. There was in the facts sufficient basis for conclusion that they had no "*bona fide*" intention of remaining permanently or indefinitely, after the decrees were rendered, if the court had wished to draw that conclusion. Credibility in such circumstances is always for the trier of fact. Worcester County Trust Co. v. Riley, 302 U. S. 292, 299; Busbank v. Ernst, 232 U. S. 162, 164.

Carolina's must be respected, when the question is raised in some one of the other forty-six states. But one thing we do know. "*The State of domiciliary origin* should not be bound by *an unfounded, even if not collusive*, recital in the record of a court of another State." The opinion goes on to repeat: "If a finding by the court of one State that the domicil in another State has been abandoned were conclusive *upon the old domiciliary State*, the policy of each State in matters of most intimate concern would be subverted by the policy of every other State." (Emphasis added.)

The question is not simply pertinent, it is imperative, whether "matrimonial domicil" has not merely been recast and returned to the play under the common law's more ancient name of "domicil of origin." For North Carolina is the only state which, upon the facts, conceivably could qualify either as "matrimonial domicil" or as "domicil of origin," whether or not they differ. Under the former conception it was at least doubtful whether sheer reexamination of "the jurisdictional fact" previously determined could be made outside the state granting the divorce and the state of "matrimonial domicil."[3] Now we are told the decree "must be respected by the other forty-seven States *provided—and it is a big proviso*—the conditions for the exercise of power by the divorce-decreeing court are validly established *whenever* that judgment is *elsewhere* called into question." (Emphasis added.)

If this means what it says, the proviso is big. It swallows the provision. Unless "matrimonial domicil," banished in *Williams I*, has returned renamed in *Williams II*, every decree becomes vulnerable in every state. Every divorcee, wherever granted, whether upon a residence of six weeks, six months or six years, may now be reexamined by every other state, upon the same or different evidence, to redetermine the "jurisdictional fact," always the ultimate conclusion of "domicil." For the grounds of the decision wholly negate that its effect can be limited to decrees of states having so-called "liberal" divorce policies; or to decrees recently granted; or to cases where different evidence is presented. It is implicit and inherent in the "unitary-domicil, jurisdictional-fact, permissible-inference" rule that any decree, granted after any length of time, upon any ground for divorce, and however solid the proof, may be reexamined either by "the state of domiciliary origin" or by any other state, as the case uncertainly may

[3] Haddock v. Haddock, 201 U. S. 562, 572.

be. And all that is needed, to disregard it, is *some* evidence from which a jury reasonably may conclude there was no domiciliary intent when the decree was rendered. That is, unless the Court means to reserve decision upon the weight of the evidence and thus "to retry the facts," contrary to its declared intention, in some case or cases not defined or indicated.

II.

Obviously more is involved than full faith and credit for judgments of other states. Beneath the judgments of Nevada lie her statutory law and policy. These too are denied recognition. This is not a case in which the denial extends, or could extend, to the judgment alone. For the North Carolina verdict and judgment do not purport to rest on any finding of fraud or other similar ground, whereby the petitioners procured judgments from the Nevada courts which the manner of their procurement vitiates.[7]

No such issue, impeaching the Nevada decree, has been made. The state asked no instructions on such a theory and none were given.[8] The verdict and judgment therefore have not determined and do not rest upon any such ground.

In view of this fact I am completely at loss to understand what is meant, in the context of this case, by "an *unfounded*, even if *not collusive*, recital" which the state of domiciliary origin, perhaps others too, is free to disregard. The statement itself negates collusion as a ground for the decision. And, as I read the remainder of the opinion, it concedes and must concede, if the two judgments

[7] The case was not tried on any theory that Nevada's court was defrauded or her law evaded. No effort was made to bring it within that well recognized exception to the binding effect of judgments generally. United States v. Throckmorton, 98 U. S. 61; Toledo Scale Co. v. Computing Scale Co., 261 U. S. 399. Nor is that ground asserted here to support the denial of credit. It was not suggested, and is not now, that Nevada either would, or could be required to, set aside her judgment or reach a different result, upon the evidence this record presents; or that she now is bound to give full faith and credit to North Carolina's decision. Nor has it been contended that the Nevada evidence was not adequate to support her finding.

[8] Petitioners' motion for judgment by nonsuit, which the court denied, was grounded in part upon the absence of evidence of fraud upon the Nevada court or law and alleged incompetence of such evidence if tendered. They also objected to the portions of the charge which submitted the issue of "bona fide domicil" without reference to the effect of the evidence as tending to vitiate the Nevada decree. "Bona fides" is inherently an element in domiciliary intent. Merely adding the phrase as qualifying adjective does not raise an issue of fraud. For this reason, founded in the state of the record, the Court eschews grounding the decision upon fraud or collusion.

are to be tested alike; that the Nevada decree was not unfounded. The shape the issues have taken compels this conclusion.

Accordingly the case must be considered as shorn of any element of fraud, deceit or evasion of Nevada's law, of showing that the Nevada court was imposed upon in any way or did other than apply the Nevada law according to its true intent and purpose. It must be taken also as devoid of any showing that Nevada failed in any way to comply with every requirement this Court has made respecting jurisdiction or due process of law for rendering a valid divorce decree. *Williams* v. *North Carolina*, 317 U. S. 287.

The case therefore stands stripped of every difference, prudently material, from the Nevada proceedings save two. There was none, jurisdictionally, in the issues. There was only different evidence upon which the same issue was determined in opposite fashions. And the states had different policies concerning divorce.

The difference in the evidence affected solely events taking place after the Nevada decree, the return to North Carolina and the cohabitation there. Ordinarily, valid judgments are not overturned, *Schneiderman* v. *United States*, 320 U. S. 118, or disregarded upon such retroactive proof.[9] But here this proof was not tendered in attack upon the Nevada decree. It was offered and admitted exclusively to relitigate the same issue that decree had determined, upon adequate evidence and in full compliance with Nevada law and the federal law giving Nevada jurisdiction to determine it. *Williams I*; *Williams II*. Its sole function was to show that petitioners did not have the very intent the Nevada court, with eyes not blinded,[10] had found they possessed.

Moreover, the character of the Court's ruling makes the difference in the evidence, as it bore upon the controlling issue, of no materiality. It is not held that denial of credit will be allowed, only if the evidence is different or depending in any way upon the character or the weight of the difference. The test is not different evidence. It is evidence, whether the same or different and, if different, without regard to the quality of the difference, from which an opposing set of inferences can be drawn by the trier of fact "not unreasonably." Presumably the Court will not "retry the facts" in either case.

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[9] Cf. Cochrane v. Deener, 95 U. S. 355; United States v. Maxwell Land-Grant Co., 121 U. S. 325, 381; United States v. San Jacinto Tin Co., 125 U. S. 273, 300; Lalone v. United States, 164 U. S. 255; United States v. American Bell Tel. Co., 167 U. S. 224. See 9 Wigmore, Evidence (3rd ed.) § 2498.

[10] Cf. note 5.

But it does not define "not unreasonably." It vaguely suggests a supervisory function, to be exercised when the denial strikes its sensibilities as wrong, by some not stated standard. So to suspend the matter is not law. It is only added uncertainty.

If the Court means not "to retry the facts," the suggestion is wholly out of place. Then the test will be as it is in other cases where the question is whether a jury's verdict will be sustained, upon an issue alleging want of supporting evidence. There will be no "weighing." There will be only examination for sufficiency, with the limits marked by "scintillas" and the like.[11]

If this is the test, for all practical purposes the Court might as well declare outright that states of domiciliary origin are free to deny faith and credit to divorces granted elsewhere. For the case will be rare indeed where, by this standard, "domicil" can be determined as a matter of law, when divorce has been secured after departure from such a state. These are the only cases that matter. The issue does not arise with stay-at-homes. With others, it always can be raised and nearly always with "some" evidence, more than a "scintilla," to sustain both contentions.

But if the test is different, "weighing" necessarily becomes involved and implicitly is what has been done in this case, notwithstanding the disclaimer. In that event, the crux of jurisdiction becomes the difference in the evidence; in this case, the return to North Carolina and cohabitation there.

If this is the decision's intended effect, it should be squarely so declared. Too much hangs for too many people and for the states themselves upon beclouding it with a "different set of inferences—refusal to retry the facts" gloss or otherwise. It cannot be assumed that the matter will affect only a few. For this has become a nation of transient people. Lawyers everywhere advise for or against divorce and courts grant or deny it, depending not on the probability that the case will come here, but on what is done here with the few cases which do come. The matter is altogether too serious, for too many, for glossing over the crucial basis of decision.

Whether the one test or the other is intended, or perhaps still another not suggested, North Carolina's action comes down to

[11] Cf. Commissioners of Marion County *v.* Clark, 94 U. S. 278, 284; Jones *v.* East Tennessee, V. & G. R. Co., 128 U. S. 443, 445; Tiller *v.* Atlantic Coast Line R. Co., 318 U. S. 54, 68; Bailey *v.* Central Vermont Ry., 319 U. S. 350, 353, 354; Tennant *v.* Peoria & P. U. Ry. Co., 321 U. S. 29, 35; 9 Wigmore, § 2494.

sheer denial of faith and credit to Nevada's law and policy, not merely to her judgment; and the decision here, to approval of this denial. The real difference, in my opinion the only material one, as the issues and the decision have been made on this record, is that one suit and judgment took place in Nevada, the other in North Carolina, and the two states have different policies relating to divorce. Nor does the degree or quality of the difference in policies matter. It also is not weighed.[12] The difference may be small for anything that is said, yet there is freedom to withhold credit.

If this is the test, every divorce granted a person who has come from another state is vulnerable wherever state policies differ, as they do universally if no account is taken of the weight of difference.

It is always a serious matter for us to say that one state is bound to give effect to another's decision, founded in its different policy. That mandate I would not join in any case if not compelled by the only authority binding both the states and ourselves. Conceivably it might have been held that the full faith and credit clause has no application to the matters of marriage and divorce. But the Constitution has not left open that choice. And such has not been the course of decision. The clause applies, but from today it would seem only to compel "respect" or something less than faith and credit, whenever a jury concludes "not unreasonably," by ultimate inference from the always conflicting circumstantial evidence, that it should not apply. Wherever that situation exists, the finding that there was no "bona fide" domiciliary intent comes in every practical effect to this and nothing more.

Permitting the denial is justified, it is said, because we must have regard also for North Carolina's laws, policies and judgments. And so we must. But thus to state the question is to beg the controlling issue. By every test remaining effective, and not disputed, Nevada had power to alter the petitioner's marital status. She made the alteration. If it is valid, neither North Carolina nor we are free to qualify it by saying it shall not be effective there, while it is effective in Nevada, and stands without impeachment for ineffectiveness there.

Just that denial is what the terms of the Constitution and the Act of Congress implementing them forbid. It is exactly for the

[12] Cf. note 16.

situation where state policies differ that the clause and the legislation were intended. Without such differences, the need for constitutional limitation was hardly one of magnitude. The apparent exceptions for fraud and want of jurisdiction were never intended to enable the states to disregard the provision and each other's policies, crystallized in judgment, when every requisite for jurisdiction has been satisfied and no showing of fraud has been presented. They have a different purpose, one consistent with the constitutional mandate, not destructive of its effect. That purpose is to make sure that the state's policy has been applied in the judgment, not to permit discrediting it or the judgment when the one validly crystallizes the other. Such an exception, grafted upon the clause, but nullifies it. It does so totally when the weight and quality of the difference in policies has no bearing on the issue.

Lately this fact has been recognized increasingly in relation to other matters than divorce.[13] The very function of the clause is to compel the states to give effect to the contrary policies of other states when these have been validly embodied in judgment. To this extent the Constitution has foreclosed the freedom of the states to apply their own local policies. The foreclosure was not intended only for slight differences or for unimportant matters. It was also for the most important ones. The Constitution was not dealing with puny matters or inconsequential limitations. If the impairment of the power of the states is large, it is one the Constitution itself has made. Neither the states nor we are free to disregard it. The "local public policy" exception is not an exception, properly speaking. It is a nullifying compromise of the provision's terms and purpose.

The effort at such compromise, in matters of divorce and remarriage, has not been successful. Together with the instrument by which the various attempts have been made, i. e., the notion of "unitary domicil" constitutionalized as "jurisdictional fact," this effort has been the source of the long confusion in the circle of decision here. To it may be attributed the reification of the marital status, now discarded in name if not in substance, and the splitting of the *res* to make two people husband and wife in one state, divorced in another. *Haddock* v. *Haddock*, *supra*; cf. *Williams II*. Now it leads to practical abandonment of the effort, of

[13] Cf. Milwaukee County v. M. E. White Co., 296 U. S. 268; Titus v. Wallick, 306 U. S. 282; Texas v. Florida, 306 U. S. 398, 410.

this Court's function, and of the obligation placed upon the states, by committing to their juries for all practical effects the final choice to disregard it.

III.

I do not concur in the abdication. I think a major operation is required to prevent it. The Constitution does not mention domicil. Nowhere does it posit the powers of the states or the nation upon that amorphous, highly variable common-law conception. Judges have imported it. The importation, it should be clear by now, has failed in creating a workable constitutional criterion for this delicate region. In its origin the idea of domicil was stranger to the federal system and the problem of allocating power within it. The principal result of transplanting it to constitutional soil has been to make more complex, variable and confusing than need be inherently the allocation of authority in the federal scheme. The corollary consequence for individuals has been more and more to infuse with uncertainty, confusion, and caprice those human relations which most require stability and depend for it upon how the distribution of power is made.

In my opinion these consequences are inevitable as long as "unitary domicil" usurps the role of "jurisdictional fact" and is applied under the "permissible inference" rule to turn questions of power first for creating jurisdiction, then for nullifying the effects of its exercise, to settle and then unsettle the human relations resting upon the power's exertion. The conception has outlived its jurisdictional usefulness unless caprice, confusion and contradiction are the desirable criteria and consequences of jurisdictional conceptions.

Stripped of its common-law gloss, the basic constitutional issue inherent in the problem is whether the states shall have power to adopt so-called "liberal" divorce policies and grant divorces to persons coming from other states while there transiently or for only short periods not sufficient in themselves, absent other objective criteria, to establish more than casual relations with the community. One could understand and apply, without decades of confusion, a ruling that transient divorces, founded on fly-by-night "residence," are invalid where rendered as well as elsewhere; in other words, that a decent respect for sister states and their interests requires that each, to validly decree divorce, do so only after the person seeking it has established connections which give

evidence substantially and objectively that he has become more than casually affiliated with the community. Until then the newcomer would be treated as retaining his roots, for this purpose, as so often happens for others, at his former place of residence. One equally could understand and apply with fair certainty an opposite policy frankly conceding state power to grant transient or short-term divorces, provided due process requirements for giving notice to the other spouse were complied with.

Either solution would entail some attenuation of state power. But that would be true of any other, which would not altogether leave the matter to the states and thus nullify the constitutional command. Strong considerations could be stated for either choice. The one would give emphasis to the interests of the states in maintaining locally prevailing sentiment concerning familial and social institutions. The other would regard the matter as more important from the standpoint of individual than of institutional relations and significance. But either choice would be preferable to the prevailing attempt at compromise founded upon the "unitary domicil-jurisdictional fact-permissible inference" rule.

That compromise gives effect to neither policy. It vitiates both; and does so in a manner wholly capricious alike for the institutional and the individual aspects of the problem. The element of caprice lies in the substantive domiciliary concept itself and also in the mode of its application.

Domicil, as a substantive concept, steadily reflects neither a policy of permanence nor one of transiency. It rather reflects both inconstantly. The very name gives forth the idea of home, with all its ancient associations of permanence. But "home" in the modern world is often a trailer or a tourist camp. Automobiles, nation-wide business and multiple family dwelling units have deprived the institution, though not the idea, of its former general fixation to soil and locality. But, beyond this, "home" in the domiciliary sense can be changed in the twinkling of an eye, the time it takes a man to make up his mind to remain where he is when he is away from home. He need do no more than decide, by a flash of thought, to stay, "either permanently or for an indefinite or unlimited length of time."[14] No other connection of

[14] Citation of authority is hardly needed for reference to the difficulties courts have encountered in the effort to define this intent. "Animus manendi" is often a Latin refuge which succeeds only in evading not in resolving the question with which Job wrestled in his suffering.

permanence is required. All of his belongings, his business, his family, his established interests and intimate relations may remain where they have always been. Yet if he is but physically present elsewhere, without even bag or baggage, and undergoes the mental flash, in a moment he has created a new domicil though hardly a new home.

Domicil thus combines the essentially contradictory elements of permanence and instantaneous change. No legal conception, save possibly "jurisdiction," of which it is an elusive substratum, affords such possibilities for uncertain application. The only thing certain about it, beyond its uncertainty, is that one must travel to change his domicil. But he may travel without changing it, even remain for a lifetime in his new place of abode without doing so. Apart from the necessity for travel, hardly evidentiary of stabilized relationship in a transient age, the criterion comes down to a purely subjective mental state related to remaining for a length of time never yet defined with clarity.

With the crux of power fixed in such a variable, small wonder that the states vacillate in applying it and this Court ceaselessly seeks without finding a solution for its quandary. But not all the vice lies in the substantive conception. Only lawyers know, unless now it is taxpayers[1] and persons divorced, how rambling is the scope of facts from which proof is ever drawn to show and negate the ultimate conclusion of subjective "fact." They know, as do the courts and other tribunals which wrestle with the problem, how easily facts procreative of conflicting inferences may be marshalled and how conjectural is the outcome. There is no greater legal gamble. Rare is the situation, where much is at stake, in which conflicting circumstances cannot be shown and where accordingly conflicting ultimate inferences cannot be drawn.

The essentially variable nature of the test lies therefore as much in the proof and the mode of making the conclusion as in the substantive conception itself. When what must be proved is a variable, the proof and the conclusion which follows upon it inevitably take on that character. The "unitary domicil-jurisdictional fact

[1] Cf. Tilt v. Kelsey, 207 U. S. 43; Iowa v. Slimmer, 248 U. S. 115; Worcester County Trust Co. v. Riley, 302 U. S. 292; Texas v. Florida, 306 U. S. 398; Sweeney v. District of Columbia, 113 F. 2d 25, cert. denied, 310 U. S. 631. Compare District of Columbia v. Murphy, 314 U. S. 441, with District of Columbia v. Pace, 320 U. S. 698. See 121 A. L. R. 1200; Tweed and Sargent, Death and Taxes Are Certain—But What of Domicile? (1959) 53 Harv. L. Rev. 68.

permissible inference" variable not only is an inconstant, vacillating pivot for allocating power. It is inherently a surrender of the power to make the allocation.

That effect is not nullified by vague reservation of supervisory intent. For supervision in any case that matters, that is, wherever the issue is crucial, nullifies the test. I think escape should be forthright and direct. It can be so only if the attempt to compromise what will not yield to compromise is forsworn, with the ancient gloss that serves only to conceal in familiar formula its essentially capricious and therefore nullifying character. This discarded, choice then would be forced between the ideas of transiency with due process safeguards and some minimal establishment of more than casual or transitory relations in the new community, giving the newcomer something of objective substance identifying him with its life.

With this choice made, objective standards of proof could apply, for the thing to be proved would be neither subjective nor so highly variable as inference of state of mind in ambiguous situation always must be. Neither domicil's sharp subjective exclusions between the old and the new nor its effort to probe the unprovable workings of thought at some past moment, as in relation to the length of time one purposed remaining or whether there was vestigial and contingent intent to return, would be material.

With the subjective substratum removed, the largest source of variable and inconstant decision would disappear. This would be true, whether transiency guarded by due process or some more established but objectively determinable relation with the community were chosen for the standard to turn the existence of power. Either choice would be preferable to the variable which can give only inconstant and capricious effects, nullifying both policies.

If by one choice states of origin were forced to modify their local policies by giving effect to the different policies of other states when crystallized in valid judgments, that would be no more than the Constitution in terms purports to require. And it may be doubted their surrender would be much greater in practical effects than the present capricious and therefore deceptive system brings about.[16] If by some more restrictive choice states now free to give

[16] The residence requirements of the states for absolute divorce vary depending at times on the ground for divorce relied on, the place where the cause of action arose, or other factors. Speaking generally, approximately 33 states require one year's residence in most divorce actions. Nine states

essentially transient divorce were required to modify that policy for locally valid effects, ~~within the limits~~ of any objective standard that conceivably would be acceptable for constitutional purposes, the obligations they owe to the nation and to sister states would seem amply to justify that modest curtailment of their power. It is hard to see what legitimate substantial interest a state may have in providing divorces for persons only transiently there or for newcomers before they have created, by reasonable length of stay or other objective standards, more than fly-by-night connections.

I therefore dissent from the judgment which, in my opinion, has permitted North Carolina at her substantially unfettered will to deny all faith and credit to the Nevada decree, without in any way impeaching or attempting to impeach that judgment's constitutional validity. But if she is not to be required thus to give the faith and credit due, in my opinion she should not be allowed to deny it by any standard of proof which is less than generally is required to overturn or disregard a judgment upon direct attack. Cf. *Schneiderman* v. *United States*, 320 U. S. 118. The solemnity of the judicial act and the very minimum of "respect" due the action of a sister state should compel adherence to this standard, though doing so would not give *the full* faith and credit which the Constitution commands. To approximate the constitutional policy would be better than to nullify it.

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are more severe, 7 of these requiring 2 years' residence and two a longer period. Six states are less severe. Of these, North Carolina at present requires a 6 months' residence and the others six weeks to three months. See Warren, Schouler Divorce Manual (1944) 705-720. Thus, practically-speaking, 39 states require one year or less, only 9 longer.

It seems questionable, at any rate, that the grounds for divorce as such have "jurisdictional" significance. Presumably, if length of residence is the controlling factor, all of the states would be required to give effect to divorces granted by the 42 requiring one year or longer, unless the greatly preponderant legislative judgment is to be disregarded. The permissible denial accordingly would extend at the most to decrees granted by the six states requiring less than one year. It is difficult to see how greatly disruptive effects would be created for them or for the other states by requiring them to approximate the generally prevailing judgment as to the length of the period appropriate for granting impeccable divorce.

SUPREME COURT OF THE UNITED STATES.

No. 84.—October Term, 1944.

O. B. Williams and Lillie Shaver Hendrix, Petitioners, vs. The State of North Carolina. } On Writ of Certiorari to the Supreme Court of the State of North Carolina.

[May 21, 1945.]

Mr. Justice Black, dissenting.

Anglo-American law has, until today, steadfastly maintained the principle that before an accused can be convicted of crime, he must be proven guilty beyond a reasonable doubt. These petitioners have been sentenced to prison because they were unable to prove their innocence to the satisfaction of the State of North Carolina. They have been convicted under a statute so uncertain in its application that not even the most learned member of the bar could have advised them in advance as to whether their conduct would violate the law. In reality the petitioners are being deprived of their freedom because the State of Nevada, through its legislature and courts, follows a liberal policy in granting divorces. They had Nevada divorce decrees which authorized them to remarry. Without charge or proof of fraud in obtaining these decrees,[1] and without holding the decrees invalid under Nevada law, this Court affirms a conviction of petitioners, for living together as husband and wife. I cannot reconcile this with the Full Faith and Credit Clause and with congressional legislation passed pursuant to it.

It is my firm conviction that these convictions cannot be harmonized with vital constitutional safeguards designed to safeguard individual liberty and to unite all the states of this whole country into one nation. The fact that two people will be deprived of their constitutional rights impels me to protest as vigorously as I can against affirmance of these convictions. Even more, the Court's opinion today will cast a cloud over the lives

[1] Previous decisions of this Court have asserted that a state cannot justify its refusal to give another state's judgment full faith and credit, at least, in the absence of a showing that fraud is an adequate ground for setting the judgment aside in the state where it was rendered. See Christmas v. Russell, 5 Wall. 290, 302-304; Maxwell v. Stuart, 22 Wall. 77, 81; Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 134.

of countless numbers of the multitude of divorced persons in the United States. The importance of the issues prompts me to set out my views in some detail.

Statistics indicate that approximately five million divorced persons are scattered throughout the forty-eight states.[2] More than 85% of these divorces were granted in uncontested proceedings.[3] Not one of this latter group can now retain any feeling of security in his divorce decree. Ever present will be the danger of criminal prosecution and harassment.

All these decrees were granted by state courts. *Erie* v. *Tompkins*, 304 U. S. 64, and cases following it, recognized the obvious truth, that rules of law laid down by state courts are binding. These judicial "laws" are represented by decrees, judgments and court opinions. Today's opinion, however, undermines and makes uncertain the validity of every uncontested divorce decree. It wipes out every semblance of their finality and decisiveness. It achieves what the Court terms the "desirable effect" of providing the "same" quality to *every* divorce decree, "wherever the question arises"—it endows them all alike with the "same" instability and precariousness. The result is to classify divorced persons in a distinctive and invidious category. A year ago, a majority of this Court in a workmen's compensation case declared that the Full

[2] According to the best available statistics more than five million divorces were granted in the last twenty years and the annual rate is steadily increasing. See Marriage and Divorce Statistics, Bureau of the Census, 1942, and the same reports for different years; Divorce, Depression and War, Social Forces, University of North Carolina Press, Dec. 1943, 191, 192; Social and Statistical Analysis, Law and Contemporary Problems, Duke University, Summer 1944; 1940 Census, Bureau of the Census, Vol. 4, Tables 29 and 48; Ogburn, Marriages, Births and Divorces, Annals, American Academy, Sept. 1943, 20.

[3] This percentage is shown by the various "Marriage and Divorce" publications of the Bureau of the Census, Department of Commerce. Careful studies in particular localities have indicated that the percentage of uncontested divorces is substantially above the 85% shown in Census Reports. In Maryland, for instance, 3306 petitions for divorce were filed in 1929. 1847 defendants failed to answer and the complainant had decrees in all but six cases. "A total of 1459 defendants, however, filed answers to the plaintiff's allegations and thus staged a technical contest. This does not necessarily mean that a given defendant was opposed to a decree being granted. Of these 1459 technically contested actions, 442 dropped out without coming to hearing, thus leaving 1017 technical contests in the field. . . . If we accompany the plaintiffs in the 1017 remaining technical contests to the hearing, we find little in the way of substantial contest. There is a positive record of no contest in 808 cases; of a contest in 81 cases; and data are not available with respect to contest in 128 cases. . . . It seems likely that in less than 100 cases was there at the hearing a contest concerning whether a decree should be granted." Marshall and May, The Divorce Court, 226-227.

Faith and Credit Clause of the Constitution was a "nationally unifying force";[4] today, as to divorce decrees, that clause, coupled with the new content added to the due process clause, has become a nationally disruptive force. Uncontested divorce decrees are thus so degraded that a person who marries in reliance upon them can be sent to jail. With much language the Court has in effect adopted the previously announced hypothesis upon which the North Carolina Supreme Court permitted another person to be sent to prison, namely, that "the full faith and credit clause does not apply to actions for divorce, and that the states alone have the right to determine what effect shall be given to the desires of other states in this class of cases." *State* v. *Herron*, 175 N. C. 754, 758; cf. *Matter of Holmes*, 291 N. Y. 261, 273.

The petitioners were married in Nevada. North Carolina has sentenced them to prison for living together as husband and wife in North Carolina. This Court today affirms those sentences without a determination that the Nevada marriage was invalid under that State's laws. This holding can be supported, if at all, only on one of two grounds: (1) North Carolina has extra-territorial power to regulate marriages within Nevada's territorial boundaries, or, (2) North Carolina can punish people who live together in that state as husband and wife, even though they have been validly married in Nevada. A holding based on either of these two grounds encroaches upon the general principle recognized by this Court that a marriage validly consummated under one state's laws is valid in every other state.[5] If the Court is today abandoning that principle, it takes away from the states a large part of their hitherto plenary control over the institution of marriage. A further consequence is to subject people to criminal prosecutions for adultery and bigamy merely because they exercise their constitutional right to pass from a state in which they were validly married into another state which refuses to recognize their marriage. Such a consequence runs counter to the basic guarantees of our federal union. *Edwards* v. *California*, 314 U. S. 160. It is true that persons validly married under the laws of one state have been convicted of crime for living together

[4] Magnolia Petroleum Co. v. Hunt, 320 U. S. 430, 439.

[5] Loughran v. Loughran, 292 U. S. 216, 223-225; Dudley v. Dudley, 151 Iowa 142. Ex parte Crane, 136 N. W. 587; see Radin, Authenticated Full Faith and Credit Clause, 39 Ill. L. R. 1, 32. See also Annotations, 60 Am. St. Rep. 942; 28 L. R. A. N. S. 754; 127 A. L. R. 437.

in other states.[6] But those state convictions were not approved by this Court. And never before today has this Court decided a case upon the assumption that men and women validly married under the laws of one state could be sent to jail by another state for conduct which involved nothing more than living together as husband and wife.

The Court's opinion may have passed over the marriage question on the unspoken premise that the petitioners were without legal capacity to marry. If so, the primary question still would be whether that capacity, and other issues subsidiary to it, are to be determined under Nevada, North Carolina, or Federal law. Answers to these questions require a discussion of the divorce decrees awarded to the petitioners in a Nevada court prior to their marriage there.

When the Nevada decrees were granted, the petitioners' former spouses lived in North Carolina. When petitioners were tried and convicted, one of their former spouses was dead and the other had remarried. Under the legal doctrine prevailing in Nevada and in most of the states, these facts would make both the decrees immune from attack unless, perhaps, by persons other than the North Carolina spouses, whose property rights might be adversely affected by the decrees.[7] So far as appears from the record no person's property rights were adversely affected by the dissolution decrees. None of the parties to the marriage, although formally notified of the Nevada divorce proceedings, made any protest before or after the decrees were rendered. The State did not sue here to protect any North Carolinian's property rights or to obtain support for the families which had been deserted. The result of all this is that the right of the State to attack the validity of these decrees in a criminal proceeding is today sustained, although the State's citizens, on whose behalf it purports

[6] This question has arisen most frequently in the application of state laws making it a criminal offense for persons of different races to live together as husband and wife. See e. g., State v. Jett, 7 Baxt. (Tenn.) 9. That case has been explained as a holding that "Without denying the validity of a marriage in another State the privileges flowing from marriage may be subject to local law." Yarbrough *v.* Yarbrough, 290 U. S. 202, 218. See also Greenhow *v.* James, 80 Va. 636. Cf. Pearson *v.* Pearson, 51 Cal. 120; State *v.* Ross, 76 N. C. 242; Whittington *v.* McCaskill, 65 Fla. 162.

[7] See e.g., Foy *v.* Smith's Estate, et al., 58 Nev. 371; Dwyer *v.* Nolan, 40 Wash. 459, 1 L. R. A. N. S. 551; Chapman *v.* Chapman, 224 Mass. 427; Bingham *v.* Bingham, 255 App. Div. (N. Y.) 463; Moyer *v.* Koontz, 103 Wis. 22; Leathers *v.* Stewart, 108 Me. 96, Ann. Cas. 1913 B 366, 369-372; Kirchner *v.* Dietrich, 119 Cal. 502; Shouler Divorce Manual, 588-590.

to act, could not have done so at the time of the conviction in a civil proceeding. Furthermore, all of the parties to the first two marriages were apparently satisfied that their happines did not lie in continued marital cohabitation. North Carolina claims no interest in abridging their individual freedom by forcing them to live together against their own desires. The State's interest at the time these petitioners were convicted thus comes down to its concern in preserving a bare marital status for a spouse who had already married again. If the State's interest before that time be considered, it was to preserve a bare marital status as to two persons who had sought a divorce and two others who had not objected to it. It is an extraordinary thing for a state to procure a retroactive invalidation of a divorce decree, and then punish one of its citizens for conduct authorized by that decree, when it had never been challenged by either of the people most immediately interested in it. I would not permit such an attenuated state interest to override the Full Faith and Credit Clause of the Constitution and an Act of Congress pursuant to it.[8] Here again, North Carolina's right to attack this judgment, despite the Full Faith and Credit Clause and the Congressional enactment, is not based on Nevada law; nor could it be. For in Nevada, even the Attorney General could not have obtained a cancellation of the decree on the ground that it was rendered without jurisdiction. *State v. Moore*, 46 Nevada 65. This makes it clear beyond all doubt that North Carolina has not given these decrees the same effect that they would be given in the courts of Nevada.

The Court permits North Carolina to disregard the decrees on the following line of reasoning. No state need give full faith and credit to a "void" decree. A decree rendered by a court without "jurisdiction" is "void." No state court has "jurisdiction" to grant a divorce unless one of the parties is "domiciled" in the state. The North Carolina court has decided that these petitioners

[8] Here too we approach the domain where the line may be shadowy between the individual rights of people to choose and keep their own associates and the power of the state to prescribe who shall be their most intimate associates. People in this country do not "belong" to the state. Le Meseuir *v.* Le Meseuir, and others, [1895] A. C. 517. Our Constitution preserves an area of individual freedom which the state has no right to abridge. The flavor of the Court's opinion is that a state has supreme power to control its domiciliaries' conduct wherever they go and that the state may prohibit them from getting a divorce in another state. In this aspect the decision is not confined to a holding which relates to state as opposed to federal rights. It contains a restriction of individual as opposed to state rights. See Radin, *supra*, 28-32.

had no "domicile" in Nevada. Therefore, the Nevada court had no "jurisdiction", the decrees are "void", and North Carolina need not give them faith or credit? The solution to all these problems depends in turn upon the question common to all of them—does State law or Federal law apply?

The Constitution provides that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the *Effect thereof.*" (Emphasis added.) Acting pursuant to this constitutional authority, Congress in 1790 declared what law should govern and what "Effect" should be given the judgments of state courts. Its command is that they "shall have such faith and credit given to them as they have by law or usage in the Courts of the state from which they are taken". 28 U. S. C. 687. If, as the Court today implies, divorce decrees should be given less effect than other court judgments, Congress alone has the constitutional power to say so. We should not attempt to solve the "divorce problem" by constitutional interpretation. At least, until Congress has commanded a different "Effect" for divorces granted on a short sojourn within a state, we should stay our hands. A proper respect for the Constitution and the Congress would seem to me to require that we leave this problem where the Constitution did. If we follow that course, North Carolina cannot be permitted to disregard the Nevada decrees without passing upon the "faith and credit" which Nevada itself would give to them under its own "law or usage." The Court has decided the matter as though it were a purely *federal* question. Congress and the Constitution declared it to be a *state* question. The logic of the Court does not persuade me that we should ignore these mandates of the Congress and the Constitution. Nevada's decrees purported to grant petitioners an absolute divorce with a right to remarry. No "law or usage" of Nevada has been pointed out to us which would indicate that Nevada would, under any circumstances, consider its decrees so "void" as to warrant imprisoning those who have remarried in reliance upon such existing and unannulled decrees.

A judgment may be "void" in the general sense, and yet give rise to rights and obligations. While on the books its existence is a fact, not a theory. And it may be said of decrees, later invalidated, as of statutes held unconstitutional, that "The past cannot always be erased by a new judicial declaration. The effect

of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. . . . an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 374. Despite the conclusion that a judgment is "void", courts have in the interest of substantial justice and fairness declined to attribute a meaning to that word which would make such judgments, for all purposes, worthless scraps of paper.[9] After a judgment has been declared "void" it still remains to decide as to the consequences attached to good faith conduct between its rendition and its nullification. That determination, I think, must, in this case, under the Full Faith and Credit Clause, be made in accordance with the "law or usage" of Nevada—not of North Carolina or the Federal government.

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This brings me to the Court's holding that Nevada decrees were "void." That conclusion rests on the premise that the Nevada court was without jurisdiction because the North Carolina Court found that the petitioners had no "domicile" in Nevada. The Nevada court had based its decree on a finding that "domicile" had been established by evidence before it. As I read that evidence, it would have been sufficient to support the findings, had the case been reviewed by us. Thus, this question of fact has now been adjudicated in two state courts with different results. It should be noted now that this Court very recently has said as to the Full Faith and Credit Clause and the 1790 Congressional enactment, that "From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other." *Magnolia Petroleum Co.* v. *Hunt*, *supra*, at 438.[10] That it was appropriate for

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[9] Gray v. Prignardello, 1 Wall. 627, 634; Colvin v. Colvin, 2 Paige (N. Y.) 385; Harper, The Myth of the Void Divorce, 2 Law and Contemporary Problems, 335; The Validity of Void Divorces, 79 U. Pa. L. Rev. 158; Tainter, Restitution of Property Transferred Under Void or Later Reversed Judgments, 9 Miss L. J. 137.

[10] The Nevada court had general jurisdiction to grant divorces, and the complaint was required to allege domicile along with the other requisite allegations. Domicile is as much an integral element in the litigation as the proof of cruelty or any of the other statutory grounds for divorce in Nevada. Labeling domicile as "jurisdictional" does not make it different from what it was before. Since the Nevada court had no power to render a divorce without proof of facts other than domicile, there is nothing to prevent this Court, under its expansive interpretation of the Due Process Clause, from labeling these other facts as "jurisdictional" and taking more state powers

the Nevada court to pass upon the question of domicile can hardly be doubted, since the concurring opinion in our first consideration of this case correctly said that the "Nevada decrees do satisfy the Due Process Clause and are binding in Nevada on the absent spouses . . . ." 317 U. S. 287, 306. The Court today, however, seems to place its holding that the Nevada decrees are void on the basis that the Due Process Clause makes domicile an indispensable prerequisite to a state court's "jurisdiction" to grant divorce. It further holds that this newly created federal restriction of state courts projects fact issues which the state courts cannot finally determine for themselves. *Davis* v. *Davis*, 305 U. S. 32, provides a possible exception to this holding. It decided that where both spouses appeared, a state court could finally determine the question of domicile. Whether the Court today overrules that case I cannot be sure. Certainly, if a state court cannot finally determine the question of domicile because it is a federal question, each divorce controversy involving domicile must be subject to review here whether both parties appear or not.

I cannot agree to this latest expansion of federal power and the consequent diminution of state power over marriage and marriage dissolution which the Court derives from adding a new content to the Due Process Clause. The elasticity of that clause necessary to justify this holding is found, I suppose, in the notion that it was intended to give this Court unlimited authority to supervise all assertions of state and federal power to see that they comport with our ideas of what are "civilized standards of law." *See Malinski* v. *People of the State of New York*, Nos. 367, decided March 26, 1945. I have not agreed that the Due Process Clause gives us any such unlimited power, but unless it does, I am unable to understand from what source our authority to strip Nevada of its power over marriage and divorce can be thought to derive. Certainly, there is no language in the Constitution which even remotely suggests that the Federal government can fix the limits

into the federal judicial orbit. Both these types of facts, however labeled, were part of the controversy which the Nevada legislature gave its courts power to resolve. The state could label them "jurisdictional" and having the exclusive power to grant divorces, could attach such consequences to them as it sees fit. But, while Congress might, under the Full Faith and Credit Clause, prescribe the "effect" in other states, of decrees based on the finding, I do not think the Federal courts can, by their mere label, attach jurisdictional consequences to the state's requirement of domicile. Hence, I think the quoted statement from the Magnolia Petroleum case should control this case.

of a state court's jurisdiction over divorces. In doing so, the Court today exalts "domicile", dependent upon a mental state, to a position of constitutional dignity. State jurisdiction in divorce cases now depends upon a state of mind as to future intent. Thus "a hair perhaps divides" the constitutional jurisdiction or lack of jurisdiction of state courts to grant divorces. Cf. *Pollack* v. *Williams*, 322 U. S. 4, 21. And this "hair-line" division involves a federal question, apparently open to repeated adjudications at the instance of as many different parties as can be found to raise it. Moreover, since it is a federal question, each new litigant has a statutory right to ask us to pass on it.

The two cases cited by the Court do not support this novel constitutional doctrine. *Bell* v. *Bell*, 181 U. S. 175, held a Pennsylvania decree invalid on the ground that there was no domicile shown. It specifically stated, however that *Pennsylvania law* required one year's domicile. Neither the decision in that case, nor any of the others on which it relied, rested on an interpretation of the Due Process Clause as requiring "domicile."[11] Nor did the decision in *Andrews* v. *Andrews*, 188 U. S. 14, support today's Due Process Clause extension, for there is was said that ". . . it is certain that the Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage . . . ."[12]

It is a drastic departure from former constitutional doctrine to hold that the Federal Constitution measures the power of state

[11] Streitwolf *v.* Streitwolf, 181 U. S. 179, decided the same day as Bell *v.* Bell, held a North Dakota divorce decree invalid. That holding did not rest on any "federal concept of domicile", but on the fact that North Dakota law required "a domicile in good faith . . . for ninety days as a prerequisite to jurisdiction of a case of divorce."

[12] Andrews *v.* Andrews did not assert that any particular federal constitutional provision made domicile a state jurisdictional requirement in divorce cases. It emphasized state and common law concepts of domicile and a state's power over its "inhabitants." This emphasis led the Court to permit Massachusetts to invalidate a South Dakota divorce decree, even though both husband and wife had appeared in the South Dakota Court. Cf. Davis *v.* Davis, *supra*. Massachusetts had a statute which prohibited its "inhabitants" from going into another state to get a divorce on account of conduct which occurred in Massachusetts, or for conduct which would not have authorized a divorce under Massachusetts law. This statute obviously rested on a hypothesis that each state possesses these sweeping powers over individuals: (1) power to make it a crime for its inhabitants to go to another state to engage in conduct which might be lawful there; (2) power to punish an inhabitant who went into another state and engaged in conduct in harmony with that state's laws. If North Carolina has attempted to impose such sweeping statutory prohibition upon its inhabitants, it has not been called to our attention. In its absence the *Andrews* decision gives no support to the opinion and judgment in this case.

courts to pass upon petitions for divorce. The jurisdiction of state courts over persons and things within their boundaries has been uniformly acknowledged through the years, without regard to the length of their sojourn or their intention to remain. And that jurisdiction has not been thought to be limited by the Federal Constitution. Legislative dissolution of marriage was common in the colonies and the states up to the middle of the Nineteenth Century. A legislative dissolution of marriage, granted without notice or hearing of any kind, was sustained by this Court long after the Fourteenth Amendment was adopted. *Maynard* v. *Hill*, 125 U. S. 190; *cf. Pennoyer* v. *Neff*, 95 U. S. 714, 734-735. The provision that made "due process of law" a prerequisite to deprivation of "life, liberty, or property" was not considered applicable to proceedings to sever the marital status. It was only when legislatures attempted to create or destroy financial obligations incident to marriage that courts began to conclude that their Acts encroached upon the right to a judicial trial in accordance with due process.[13] The Court's holding now appears to overrule *Maynard* v. *Hill*, sub silentio. This perhaps is in keeping with the idea that the due process clause is a blank sheet of paper provided for courts to make changes in the Constitution and the Bill of Rights in accordance with their ideas of civilization's demands. I should leave the power over divorces in the States. And in the absence of further federal legislation under the Full Faith and Credit Clause, I should leave the effect of divorce decrees to be determined as Congress commanded—according to the laws and usages of the state where the decrees are entered.[14]

Implicit in the majority of the opinions rendered by this and other courts, which, whether designedly or not, have set up obstacles to the procurement of divorces, is the assumption that divorces are an unmitigated evil, and that the law can and should force unwilling persons to live with each other. Others approach the problem as one which can best be met by moral, ethical and religious teachings. Which viewpoint is correct is not our concern. I am confident, however, that today's decision will no more

[13] Wright v. Wright's Lessee, 2 Md. 429, 453; Crane v. Meginnis, 1 G. and J. Rep. (Md.) 463; Dwyer v. Nolan, *supra*. See also Owens v. Clayton, 56 Md. 127, 129; 2 Shouler, Marriage, Divorce and Separation, Sixth Edition, Pars. 1474-1473; Validity of Legislative Divorce, 18 L. R. A. 95.

[14] For an interesting discussion of the consequences of shifting divorces from the legislatures to the courts, to be worked out in the pattern of adversary controversies, see Marshall and May, *supra*, Chap. VI, The Mirage of Judicial Controversy. For bibliography of pertinent discussions see same, 338-341.

aid in the solution of the problem than the *Dred Scott* decision aided in settling controversies over slavery. This decision, I think, takes the wrong road. Federal courts should have less, not more, to do with divorces. Only when one state refuses to give that faith and credit to a divorce decree which Congress and the Constitution command, should we enter this field.

The Court has not only permitted North Carolina to invalidate a Nevada decree contrary to the law and usage of that State. It has actually placed the burden of establishing the validity of that decree on a defendant charged with crime. The only contested question was the validity of the decree, since the petitioners openly lived together as man and wife. And the only issue involved concerning that validity was domicile. The burden of proving that single issue upon which petitioners' liberty depended was cast upon them. Cf. *State* v. *Herron*, 175 N. C. 754, 759. The jury was not charged that the state must prove the defendants guilty; they were required to prove their innocence. The result is that a state court divorce decree is no protection from being sent to prison in another state unless a defendant charged with acting as it authorized can prove the state court made no error in resolving facts as to domicile. State court judgments exalted by the Constitution and by Congress are thus degraded to a lowly status by today's decision. State courts, no less than Federal courts, were recognized by the founding fathers as instruments of justice. I would continue to recognize them as such. At the very minimum we should not permit holders of these decrees to be convicted of crime unless another state sustained the burden of invalidating them. In a case involving nothing but property, this Court has declined to permit a second marriage to be impugned through an alleged prior marriage "save upon proof so clear, strong and unequivocal as to produced a moral conviction of the existence of that impediment." *Su Jok Liong* v. *Su Quia*, 228 U. S. 335, 339. And we declined to permit a naturalization decree to be set aside because of an absence of "clear, unequivocal and convincing evidence." *Schneiderman* v. *United States*, 320 U. S. 118, 125, 159, 164, 166-170. It is no justification for requiring a less burdensome requirement here to say that in these former cases we were dealing with federal questions. That is exactly what is done here. For the basic question in this case revolves around the Full Faith and Credit constitutional provision and the 1790

Congressional Act.—The standard of proof sustained, is a federal, not a state standard. To require a defendant in a criminal case to carry the burden of proof in sustaining his decree to prove his innocence deprives him of all but the last shred of protection that the Full Faith and Credit Clause and the 1790 Act of Congress sought to give him. Cf. *Tot* v. *United States*, 319 U. S. 463, 473. It makes of human liberty a very cheap thing—too cheap to be consistent with the principles of a free government.

Moreover, the Court's unjustifiable devitalization of the Full Faith and Credit Clause and the Act passed pursuant to it creates a situation which makes the North Carolina statute an inescapable trap for any person who places the slightest reliance on another state's divorce decree—a situation which a proper interpretation of the federal question would avoid. The North Carolina statute excludes from its coverage those who "have been lawfully divorced." Who after today's decision can know or guess what "right" he can safely exercise under a divorce decree in the intervening period between the day of its entry and the day of its invalidation by a jury?[15] This Court has said that "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and *differ as to its application* violates the first essentials of Due Process of Law" (italics added).[16] The North Carolina statute, as applied to condemn these two petitioners to serve prison sentences, falls precisely within this description. It does so, because the sole essential contested issue in this case was the validity of the divorce decrees. Involved in this issue are questions of law mixed with questions of fact which perplex lawyers and judges little

[15] The answer is that by reason of today's decision, no person can exercise any right whatever under an uncontested divorce decree without subjecting himself to possible penitentiary punishment. "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment for that Act." Cummings v. The State of Missouri, 4 Wall. 277, 327. The "condition" here, that a divorced person cannot remarry without the possibility of being subjected to repeated prosecutions in all the states where he lives as a married person, would seem to rank as "an impossible condition." If therefore the Court's object is to make divorces dangerous, its object has been accomplished. I think divorce policy is the business of the people and their legislatures—not that of this Court.

[16] Connally v. General Construction Co., 269 U. S. 385, 391. See also Yu Cong Eng v. Trinidad, 271 U. S. 500, 518; United States v. Cohen Grocery Co., 255 U. S. 81, 89-93; Lanzetta v. New Jersey, 306 U. S. 451; Smith v. Cahoon, 283 U. S. 553; Screws, et al. v. United States, No. 42, decided May 7, 1945; cf. Nash v. United States, 229 U. S. 373, 377 with Cline v. Frink Dairy, 274 U. S. 445, 457, 463-464.

less than they baffle "men of common intelligence." Today's decision adds new intricacies to the whole problem for lawyers to argue about. It provides a new constitutional concept of "jurisdiction", which itself rests on a newly announced Federal "concept of domicile." No final determination as to its own "jurisdiction" can hereafter be made by a state court in an uncontested divorce case. And so far as I can tell, no other court can ever finally determine this question. It might do so as between any two litigants, but I suppose the question of domicile would still be left open for others to challenge. A man might be tried for bigamy in two states. He might be convicted in one or both, I suppose. The affirmance of these convictions shows that a divorced person's liberty, so far as this North Carolina statute is concerned, hinges on his ability to "guess" at what may ultimately be the legal and factual conclusion resulting from a consideration of two of the most uncertain word symbols in all the judicial lexicon, "jurisdiction" and "domicile." While the doctrine that "Ignorance of the law excuses no man" has sometimes been applied with harsh consequences, American courts have not been in the habit of making ignorance of law the crucial and controlling element in a penitentiary offense. Men have from time to time been sent to prison for violating court commands which were later held invalid.[17] It is quite a different thing, however, to send people to prison for lacking the clairvoyant gift of prophesying when one judge or jury will upset the findings of fact made by another.

In earlier times, some Rulers placed their criminal laws where the common man could not see them, in order that he might be entrapped into their violation. Others imposed standards of conduct impossible of achievement to the end that those obnoxious to the ruling powers might be convicted under the forms of law. No one of them ever provided a more certain entrapment, than a statute which provides a penitentiary punishment for nothing more than a layman's failure to prophesy what a judge or jury will do. This Court's decision of a federal question today does just that.

Mr. Justice DOUGLAS joins in this dissent.

[17] See e. g., People v. Worley, 72 Col. 421; Holbrook v. Prichard Motor Co., 27 Ga. App. 480; St. George's Soc. v. Sawyer, 204 Iowa 103; State v. Morris, 100 Oregon 1.